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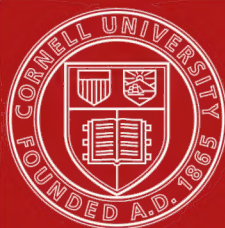
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COMMENTARIES  
ON THE LAW OF  
MUNICIPAL CORPORATIONS.

BY

JOHN F. DILLON, LL.D.,

MEMBER L'INSTITUT DE DROIT INTERNATIONAL; LATE PROFESSOR OF REAL ESTATE  
AND EQUITY JURISPRUDENCE IN COLUMBIA COLLEGE LAW SCHOOL;  
FORMERLY CIRCUIT JUDGE OF THE UNITED STATES  
FOR THE EIGHTH JUDICIAL CIRCUIT, AND  
CHIEF JUSTICE OF THE SUPREME  
COURT OF IOWA.

FOURTH EDITION,  
THOROUGHLY REVISED AND ENLARGED.

VOL. I.

BOSTON:  
LITTLE, BROWN, AND COMPANY.  
1890.

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JOHN WILSON AND SON, CAMBRIDGE.



TO THE  
HONORABLE SAMUEL F. MILLER, LL.D.,

ASSOCIATE JUSTICE OF THE SUPREME COURT  
OF THE UNITED STATES.

---

YOUR ACKNOWLEDGED MASTERY OF THE SUBJECT TO WHICH  
THIS WORK RELATES MAKES IT FITTING,  
YOUR ESTABLISHED AND PERMANENT RANK IN OUR JURIDICAL AND  
CONSTITUTIONAL HISTORY AS A GREAT AND ILLUS-  
TRIOUS JUDGE MAKES IT AN HONOR,  
AND OUR LONG AND UNBROKEN FRIENDSHIP MAKES IT A  
RENEWED PERSONAL PLEASURE,  
ALBEIT THE EVENING SHADOWS OF OUR LIVES FALL  
UPON THE PAGE,  
TO REINSCRIBE TO YOU WITH UNALTERED REGARD AND VENERATION  
THIS REVISED EDITION OF A WORK WHICH, MORE THAN  
EIGHTEEN YEARS AGO, WAS ORIGINALLY  
DEDICATED TO YOU.



## PREFACE TO THE FOURTH EDITION.

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IN the nine years that have passed since the last edition of these Commentaries appeared, constitutional provisions have been adopted, legislative enactments passed, and numerous State and Federal decisions made on the important subjects which are embraced in its plan. And thus the law has not only been still further extended on previous lines, but it has in material respects been modified, altered, and enlarged. This is well known to those who have kept currently informed of the general progress of our jurisprudence; it will be apparent to all who shall compare the chapters of the present edition with the corresponding chapters of the previous edition upon Constitutional Limitations, Contracts, Streets, Eminent Domain, Taxation, Actions and Liabilities.

That the work shall adequately present the law relating to our Municipalities as it exists to-day, the author has spared no reasonable labor. The adjudged cases to date have been examined one by one, and the results thereof are embodied in this edition.

Grateful to the Courts and to the Profession for the favor with which from the first they have regarded the work, and with, as the author trusts, a pardonable ambition on his part to improve it, he deems it to be due to them, as well as to himself, to state that he has sought with diligent and loving care to make the revision thor-



ough, and that to this end he has personally gone over not only every section but every sentence, and has made such changes as the expansion of the law required and his own maturer judgment approved. Scarcely a single section is without alterations or additions.

A few further observations may be permitted, if, indeed, they are not required. In this day of the unprecedented multiplication of law books, there are two questions which the profession may as of right put to an author. The first is, Can your work justify its existence? The justification of the present Treatise is placed on the grounds quite fully stated in the preface to the first edition, which in substance are, that the subject is of acknowledged importance in all the States and Territories of the Union; that no English work is applicable or adequate; and that no other American work thereon existed or exists.

The other question is, Can it justify its size? An elementary treatise may be wrought out upon one of two different plans. The one is to state as clearly as may be ultimate legal principles without any or much elaboration of their grounds and reasons. It requires the mind of a master to frame propositions which shall be at once comprehensive and exact. Instinctively the profession in both countries has immemorially shared in Lord ELDON's fear of the dangers that lurk in abstract and general propositions. The other is to state such propositions and principles, but to state them in connection with the reasons and grounds on which they rest, which are chiefly to be found in the adjudged cases. The latter course has been here pursued, for reasons which are peculiarly forcible in a treatise on this subject and in this country. Our Municipalities are inseparably connected with the organic framework and with the daily action of our political institutions. The law relating to them is developed day by day in the actual workings of those institutions in every

section of the country, and this development registers itself in constitutional provisions, in statutory enactments, and in judicial judgments. In this work the people, the legislatures, and the Courts, State and National, all take their respective parts, of which perhaps the most important, certainly the most varied and constant, is the part taken by the judicial tribunals. It is the high and delicate office of the judiciary department to elaborate the rough materials of our daily experience and litigation into the enduring products of law and justice, and to place on record for our instruction and guidance the reasons of the Judges for every step in this wondrous, this ceaseless, this beneficent process.

No writer on our jurisprudence is authorized to speak oracularly, to excogitate a system, or to give to his views any authoritative sanction. To this rule the most eminent are no exception, since every work upon our law is necessarily unauthoritative. No author can alter this inexorable condition; and any author ought to be content, and certainly will be fortunate, if he can leave on the imperishable structure of our jurisprudence some visible imprint, some lasting touch, some embodied memorial, however slight, of his labors. Even judicial judgments, if unaccompanied by the reasons on which they rest and which give to them their real worth, would have no recognized standing—and ought to have none—in the professional estimation and regard.

It is the humble function—but, at the same time, the priceless privilege—of an author to traverse the wide, rich, and varied fields which the legislative records and the judicial reports of all the peoples in both hemispheres who have adopted the institutions and who use the tongue of England thus open to him; to gather, analyze, and compare, and then to state the results of his labors and his studies, accompanied with his own reflections, criticisms,

and conclusions, which, however, have the value, and only the value, that their reason, soundness, and justice give to them.

The ancient mere-stones of the law must not be removed, but reverently preserved and regarded. It is, however, a mistake and a delusion to suppose that they either do or can permanently mark the actual or necessary boundaries of our jurisprudence. "In all forms of government," said Mr. BURKE, "the people is the true legislator; there are only two foundations of law,—equity and utility." This is especially true of the American States. The wants and welfare, the usages, customs, and settled notions of our people and their collected will necessarily find expression in our constitutions, statutes, and jural system. While the function of the judge is pre-eminently declarative, it is also necessarily, though subordinately, legislative; that is, he inevitably makes law in and by the very process of administering it. Whatever is of worth in this or in any legal work comes mainly from the judgments of the courts. The author desires to add that the work is purely technical, and is intended for the legal profession in every part of the country,—for lawyers who have no access to full libraries, as well as for those who have. For these reasons he has made the notes as full as practicable within the space allotted. If any shall complain of undue elaboration in this respect swelling the size of the book, the author craves leave to state it as his opinion that they probably constitute its most valuable and useful feature.

J. F. D.

NEW YORK, May, 1890.



## PREFACE TO THIRD EDITION.

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A REVISION of this Treatise has for some time been needed, but the pressure of other duties has, until recently, prevented its preparation. During the seven years that have elapsed since the last edition an unusual number of cases has been decided upon the various topics embraced in the work. The reported decisions to December 1, 1880, have all been diligently examined, and the results of such examination wrought into the texture of the present edition. This has necessarily increased its size, and correspondingly, it is hoped, its value. More than two hundred new sections have been written, and over three thousand additional cases cited. Every part has been gone over with conscientious care, and there is scarcely a section in which, either in the text or the notes, additions and changes have not been made. It has been necessary to *sectionize* the work anew, but the numbers of the former sections are enclosed in parentheses.

In consulting the Reports the author has been surprised and pleased to see the extent to which this Treatise has been used by lawyers and judges as an aid to their labors; and in again presenting it, in its new and altered shape, he gladly expresses once more his sincere and profound gratification for the favor with which it has been received.

J. F. D.

COLUMBIA COLLEGE LAW SCHOOL, NEW YORK,  
January 1, 1881.

## PREFACE TO SECOND EDITION.

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THE favor accorded to this Treatise by the profession is gratifying to the author, and compensates for the great labor of its preparation. Nothing can be more pleasing to an author than the knowledge that the studious care given to a work is appreciated by those for whom it was written: their approving opinion is the reward he covets and enjoys.

The First Edition, published about twelve months ago and of nearly double the usual size, has been exhausted, and at the request of the publishers the Second Edition has been prepared. As before, this has been the personal labor of the author. All reported cases, decided since the first publication, have been examined, and the text and notes prepared without the assistance of others. While this edition embraces a summary of recent cases to the latest date, and contains substantial additions, the structure of the work is unaltered. Some new sections have been added, and others re-written. The principal changes have been made in the chapters which treat of Municipal Securities, Taxes, and Assessments. The amount of negotiable bonds of municipalities largely exceeds the sum of the indebtedness of all the States, and it has been the earnest endeavor herein to exhibit accurately the American law upon this important subject.

In conclusion, it is deemed fitting to express to the Bench and Bar of the country a sincerely grateful appreciation of the favorable judgment already pronounced, and a hope that the same, upon further examination of the work, may be neither reversed nor modified.

J. F. D.

DAVENPORT, IOWA, 1873.

## PREFACE TO FIRST EDITION.

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THE necessity for a work upon Municipal Corporations was so seriously felt by the author when holding a seat on the Supreme Bench of a State where questions relating to the powers, duties, and liabilities of municipalities were presented at almost every term, that he resolved, eight years ago and more, to endeavor to supply the want. Although the subject is one of unsurpassed practical importance, since nearly every considerable city and town in the United States is incorporated, no American work upon it has ever appeared. A careful examination of the English treatises satisfied the author that they were, in a great measure, inapplicable here, and that they fail to cover a large portion of the existing field of the law upon the subject as enlarged by American legislation and practice. True, our municipal system, like the body of our jurisprudence, was derived from England, but it is remarkable how many changes were necessary to adapt it to our system of government and mode of administration, and to the wants and situation of our people. Accordingly, if the municipalities of the one country be closely compared with those of the other, it will be found that, in their structure, powers, and workings, they present quite as many points of difference as of similarity.

We have popularized and made use of municipal institutions to such an extent as to constitute one of the most striking features of our government. It owes to them, indeed, in a great degree, its decentralized character. When the English Municipal Corporations Reform Act of 1835 was passed, there were in England and Wales, excluding London, only two hundred and forty-six places exercising municipal functions; and their aggregate popu-

lation did not exceed two millions of people. In this country our municipal corporations are numbered by thousands, and the inhabitants subjected to their rule by millions.

Our municipalities are habitually clothed by the legislatures with extensive, important, and diversified powers, and consequently possess a much more composite character than in England or elsewhere. Strictly, a municipal corporation is an institution designed to regulate and administer the mere local or internal concerns of the incorporated place in matters pertaining to it, and not relating directly to the people of the State at large. But in this country, much more generally than in England, it is the practice to make use of the municipality, or of its officers, as agencies of the *State*, for the exercise, on its behalf, of *public*, in addition to *corporate*, duties and functions. From the difference between these two classes of powers the American courts have deduced consequences so important that it is as necessary as it is oftentimes difficult to distinguish between them. Besides, it has unfortunately become quite too common with us to confer upon our corporations extraordinary powers, such as the authority to aid in the construction of railways, or like undertakings, which are better left exclusively to private capital and enterprise, and to create in their corporate capacity indebtedness therefor, enforceable by actions in the courts, and which must be paid by taxation.

Invested, also, within certain limits, with delegated legislative authority concerning the property and conduct of their inhabitants; with capacity, more or less extensive, to acquire and dispose of property; with the power to elect their own officers; to make contracts; to incur liabilities; to exercise Eminent Domain; and the more momentous power to levy and collect taxes, general and special,—these corporate agencies are thus brought into intimate and daily contact with the most important rights and interests of their inhabitants, and as a result we have an amount and variety of litigation not to be found in the tribunals of other countries. In no English treatise on Municipal Corporations is there a chapter upon the subject of civil actions and liabilities, and no discussion of the question as to their amenability to respond civilly in damages to individuals for acts of misfeasance, or for neglect of duty; and, for reasons not material to be here stated, the occurrence of questions of this kind in the English

tribunals has been comparatively infrequent. The American Reports, however, teem with cases on this subject, and the civil liability of municipal corporations upon contracts and for torts, and the mode of enforcing it, are with us the most important practical topics requiring treatment in a work of this character.

There being no American work on this branch of the law, and the decisions in this country relating to it being scattered through the reports of the federal courts, and those of thirty-seven States, there was little to guide the author, either as to the arrangement of his subject, or as to what had been decided by the courts concerning it. Accordingly he had no resource except to delve laboriously for his materials among hundreds of volumes; but these have, one by one, been examined by him with a view to find all that could be advantageously used to illustrate the subject; and the result is given, either in the text or notes, as fully as it was practicable within the compass of a single volume. Nor has he overlooked the aid to be derived from other sources. Every English publication relating to the subject in its legal or practical relations has been subjected to examination; books which could not otherwise be had have been specially procured from abroad. And, throughout the present volume, no inconsiderable pains have been taken to set forth wherein the English and American municipalities differ, so that the applicability and precise legal value of the judicial decisions of the former country would be better understood.

When the work was resolved upon, the author hoped to proceed with the leisurely care that would enable him to avoid the faults which thorough deliberation might result in correcting. This hope has not been as fully realized as he desired, for year by year his official duties have more and more encroached upon his time, leaving for this work only the diminishing intervals between courts. In its preparation he has often envied the author by profession the opportunity for continuous and unbroken labor, and he cannot but feel that if his work had not been prepared in fragments, it would not have fallen both so far below his ideal, and what, under more auspicious circumstances, he himself might have made it. It is hoped, however, if it shall lack the symmetry and finish such an author would have given it, that it may have compensating advantages in its thoroughly *practical character*; and these it will surely owe to that experience to which the mere

student or professional writer must ever be a stranger, and which can be had only upon the Bench or at the Bar.

Some peculiarities in the *manner* of its preparation will be observed. The aim throughout has been to make a work which will be useful to the profession. Aware that in most cases access to complete law libraries cannot be had, the author has endeavored, as far as practicable, to supply this want, and to make the text and notes exhibit the substance of the adjudications. This explains why so much care has been taken to cite the cases bearing upon the subjects discussed, and accounts for the fulness of proofs and illustrations to be found in the notes.

He trustfully submits the work, which fills up the interstices between judicial duties for nearly nine years, to the profession for whose assistance it is designed, and whose final judgment on it will not be otherwise than just. If he could be assured that it has a value at all proportioned to the labor first and last bestowed upon it, he would venture to hope for a judgment not altogether unfavorable.

DAVENPORT, IOWA, 1872.

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NOTE.—The first edition of this work was dedicated as follows:—

TO THE

HONORABLE SAMUEL F. MILLER, LL.D.

ASSOCIATE JUSTICE OF THE SUPREME COURT  
OF THE UNITED STATES.

Whether I share in the general admiration of your judicial talents, or listen to the more persuasive suggestions of a voice that comes to me from long association at the bar and upon the bench, there is no one to whom I can inscribe, so fittingly as to yourself, a work relating to an important branch of that science which you have studied so deeply and understand so well.

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**COMMENTARIES**  
**ON THE LAW OF**  
**MUNICIPAL CORPORATIONS.**





# A TREATISE

## ON THE

# LAW OF MUNICIPAL CORPORATIONS.

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### CHAPTER I.

MUNICIPAL INSTITUTIONS. — INTRODUCTORY HISTORICAL VIEW. —  
MUNICIPAL ABUSES. — REMEDIES SUGGESTED.

§ 1. As this treatise is designed strictly for the practising lawyer, it does not fall within its scope to give a detailed account of the origin and rise of cities and towns, or to trace minutely the history of the rights, powers, and jurisdiction with which they are now generally invested. Such inquiries more appropriately belong to the legal antiquary, to the historian, or to the general scholar; and yet a brief historical survey of municipalities will conduce to a more intelligent understanding, even in its practical bearings, of the subject of which it is proposed to treat.<sup>1</sup> The existence of towns and cities, and probably the exercise by them, to a greater or less extent, of local jurisdiction, may be ascribed to a very remote period.

PHŒNICIA and EGYPT were noted for their large and splendid

<sup>1</sup> Mr. Dicey has some just observations on the different purposes of the historical and of the legal inquirer. "An historian is primarily occupied with ascertaining the steps by which a constitution has grown to be what it is. He is deeply, sometimes excessively, concerned with questions of 'origins.' He is only indirectly concerned in ascertaining what are the rules of the Constitution in the year 1886. To a lawyer on the other hand, the primary object of study is the law as it now stands; he is only secondarily occupied with ascertaining how it came into existence."

Dicey, *Law of the Constitution* (2d ed.), Lect. I. The present work is intended for the use of courts and lawyers, and the historical view of the development of municipal institutions in this country is entirely subordinated to the legal and strictly technical view. In the course of the present chapter and elsewhere, the sources of historical information are more or less indicated, and the author specially refers with pleasure to the valuable series of publications on Local Government in the United States, in *The Johns Hopkins University Studies*.

cities. In the latter country we find Memphis, one of the Old World's proudest capitals, even whose site was, until recently, a matter of learned conjecture. It was, centuries ago, buried beneath the sands of the encroaching desert, and in our own day it has been exhumed in the midst of Bedouins too wild to be interested in the wondrous revelations of its entombed mysteries. Temples and buildings, vast and magnificent, dating probably fifteen centuries before the Christian era, and preserved by burial from decay and spoliation, may to-day be seen almost in their original perfection. "The pyramids themselves," as Fuller quaintly says, "doting with age, have forgotten the names of their founders." There, too, in "old, hushed Egypt and its sands," on the banks of the Nile, are the massive ruins of Thebes (Diospolis), the city of "the hundred gates," antedating secular history, and claimed by the Egyptians to have been the first capital, as undoubtedly it was one of the oldest cities of the historic world. As the eye runs along the colonnades of ruined temples, the mind runs back through the Egypt of the Ptolemies to the Egypt of the Pharaohs, four thousand years ago, when Thebes was in its glory and its pride. But in the midst of these stupendous remains of an early civilization, we find but little evidence of their municipal history and organization. The chief lesson they teach is that they were the centres of great wealth and power in the ruling classes, and that the *people*, who constitute the true wealth of modern cities, were at the absolute disposal of their masters, bound down and degraded by servitude and oppression.

§ 2. Notwithstanding the people of GREECE were of a common blood, language, and religion, Greece was never politically united. Political power resided not in a number of independent states, but in a large number of *free, independent, and autonomous cities*, with districts of country adjoining or attached to them. Each city, except in Attica, was sovereign; was the sole source of supreme authority, and possessed the exclusive management of its own affairs.<sup>1</sup> The citizen of one was a foreigner in the others, and could not, without permission or grant, acquire property, make contracts, or marry out of his own city. The Grecian heart always glowed with patriotic fervor for the city, but it rarely, except in times of great common danger, kindled with a love for the whole country. Although, according to Chancellor Kent,<sup>2</sup> the "civil and political institutions of

<sup>1</sup> Hearn, Government of England, chap. xvii. p. 467; Grote, Hist. Greece, ii. 302; *ib.* 348.

<sup>2</sup> 1 Kent, Com. 268, note.

some of the states of Greece bear some analogy to the counties, cities, and towns in our American States," the analogy, it must be confessed, is remote, uncertain, and without practical value in the inquiries we are to prosecute.

§ 3. Municipal Corporations, as well as Private Corporations, were familiar to the Roman Law. The learned Savigny, under the style of Juristical Persons, has traced the origin and stated the nature of *Corporations in the Roman law* with great clearness. It corresponds in essentials almost exactly with our own conceptions of corporations. Thus, he says, "The essential quality of all Corporations consists in this, that the Subject of the right does not exist in the individual members thereof (not even in all the Members taken collectively;) but in the ideal Whole; hence, by a change of an individual member, indeed even of all the members, the Essence and Unity of a Corporation is not affected."<sup>1</sup> Communities, towns, and villages are, he says, mostly older than the State, and have therefore a natural existence. Their Unity is of a geographical character, since it is based upon the local condition of dwelling and ownership of land. The governing body represents the collective Whole. Such corporations are to be distinguished from the State, since the State is not the subject of private law relations.<sup>2</sup> The communities (*i. e.*, municipal corporations as we style them) "had on the one hand need of property, and the opportunity for its acquisition, but, on the other hand, such a dependent character that they could be arraigned (unlike the State) before a court of justice."<sup>3</sup> In the required sanction of the State to their existence, in the power of the majority,<sup>4</sup> in responsibility for the obligations and frauds of their representatives,<sup>5</sup> in their property rights,<sup>6</sup> it is interesting to observe the close analogy between the concept of the Roman Corporations and our own.

Other aspects of the subject may be briefly noticed. "To conceive," says a modern author, "of ancient Rome as the capital of Italy in the same sense that London is the capital of England, or Paris of France, would be a great mistake. London and Paris are the chief cities of their respective countries, because they are the seat of government. The people of these cities and their surrounding districts have no privileges superior to those of other English or French citizens. But the city of ancient Rome, with her surrounding territory, was a great corporate body or community,

<sup>1</sup> *Jural Relations*, by Rattigan, sec. 86.

<sup>2</sup> *Ib.* sec. 86.

<sup>3</sup> *Ib.* sec. 87; *post*, sec. 556.

<sup>4</sup> *Ib.* sec. 97.

<sup>5</sup> *Ib.* secs. 92, 95.

<sup>6</sup> *Ib.* secs. 90, 91.

holding sovereignty over the whole of Italy and the provinces. None but persons enrolled on the lists of the tribes had a vote in the popular assemblies or any share in the government or legislation of the city.”<sup>1</sup> The common division of civic communities established by the Roman government was three, — *prefectures*, *municipal towns*, and *colonies*. The *prefectures* did not enjoy the right of self-government, but were under the rule of prefects, and the inhabitants were subjected to the burdens without enjoying the privileges of Roman citizens. But with the *municipal towns* it was different. They at length received the full Roman franchise; “and hence,” says the writer just named, “arose the common conception of a municipal town; that is, a community of which the citizens are members of the whole nation, all possessing the same rights, and subject to the same burdens, but retaining the administration of law and government in all local matters which concern not the nation at large,” — a description which answers almost perfectly to municipal organizations in England and America. The *colonies*, composed of Roman citizens, were established by the parent city, sometimes to reward public services, but generally as a means of securing and holding the country which had been subdued by Roman arms. The constitution of these colonies, and the rights of the citizens and communities composing them, varied; but it is not necessary for our purpose to trace these differences. The colonies were obliged to provide for the erection of a city, and cities thus erected were called *municipia*. We thus perceive the justness of the observations of a distinguished modern historian and statesman, who says that “the history of the conquest of the world by Rome is the history of the conquest and foundation of a vast number of cities. In the Roman world in Europe there was an almost exclusive preponderance of cities and an absence of country populations and dwellings.”<sup>2</sup> The

<sup>1</sup> Dr. Liddell, *Rome*, chap. xxvii. sec. 8.

<sup>2</sup> M. Guizot, *History Civilization in Europe*, Lect. II. “Rome, in its origin, was a mere municipality, a corporation. In Italy, around Rome, we find nothing but cities, — no country places, no villages. The country was cultivated, but not peopled. The proprietors dwelt in cities. If we follow the history of Rome, we find that she founded or conquered a host of cities. It was with cities that she fought, it was with cities she treated, into cities she sent colonies. In the Gauls and Spain we meet with nothing but cities; the country around is marsh and forest. In the monuments left us of ancient

Rome we find great roads extending from city to city; but the thousands of little by-paths now intersecting every part of the country were unknown. Neither do we find traces of the immense number of churches, castles, country seats, and villages which were spread all over the country during the Middle Ages. The only bequests of Rome consist of vast monuments impressed with a municipal character, destined for a numerous population, crowded into a single spot. A municipal corporation like Rome might be able to conquer the world, but it was a much more difficult task to mould it into one compact body.” *Ib.* See also 2

nation was a vast congeries of municipalities bound together by the central power of Rome. When the Romans colonized and settled the countries they had conquered they established fixed governments, and carried with them, and to some extent necessarily imparted their arts, sciences, language, and civilization to their new subjects. Although the political condition of the vanquished people was far from being desirable, still the immediate residence among them of the civilized Roman did not fail to produce effects more or less beneficial; and thus the *municipia*, securing what the Roman arms had achieved, became the efficient means of spreading civilization throughout the Roman world.

§ 3 a. The City of Ancient ROME had, in what we would call its municipal aspects, many features which correspond with those of the large cities of our own day, and whose study will afford us lessons of interest and value, since it shows that large and compact aggregations of people *necessarily* give rise to conditions and create wants peculiar to such circumstances, and which, as pointed out in the preceding section, are not common to rural populations and to the state at large. Special provisions are therefore necessary for the health, safety, convenience, and good government of populous communities crowded within a narrow space, and these must be supplied. In its essential municipal wants and in the means of meeting them Ancient Rome bears a close analogy to London, Paris, or New York. To secure the comfort and health of the city, and to prevent and extinguish fires, Rome in the course of time provided itself with a *magnificent water supply*. Its system consisted of fourteen aqueducts whose aggregate length was 359½ miles, of which 304 miles were underground, often through mountains and along valleys, and 55 miles were above ground, the channel being carried on what is really triumphal arcades, sometimes rising to the height of more than 100 feet. As a sanitary necessity, the city constructed drains to carry off the sewage. The Cloaca Maxima is not only a large but it is a wonderful work — “an immense sewer, built twenty-five centuries ago, on unstable ground, under enormous practical difficulties, which still answers its purpose well, and which ranks among the greatest triumphs of engineering skill.” For the health and pleasure of the people Rome also supplied itself with *public places of resort* more adequately, perhaps, than have any of the great modern cities. Lanciani, as the result of explorations and of his own examinations and researches, says that “towards the

end of the third century after Christ, there were in Rome eight *campi* or commons, green spaces set apart mostly for foot-races and gymnastic exercises; eighteen *fora* or public squares, and about thirty parks or gardens, which, first laid out by wealthy citizens for their private comfort or that of their friends, had been absorbed into the imperial domain by purchase, by bequest, or by confiscation. The city was not only surrounded and enclosed by them, but intersected by them in every direction." Modern cities have nothing fully answering to these forums or public squares, either in cost, area, or magnificence. They gave to the people of Rome more than twenty-five acres in extent for various public uses. In the public baths 62,800 citizens could bathe at the same moment. Rome had also its Police and Fire Departments. The public safety was entrusted to a select body of 7,500 men, whose function corresponds to that of the 9,000 policemen of London. The Roman policeman, however, performed the double duty of fireman and policeman.

In a most important particular, however, Rome suffers by comparison with modern cities. Its public places *were not lighted*. All business closed with the daylight. The streets at night were dangerous. Property was insecure. No attempt at public illumination was made. The idea does not seem to have occurred to them. Persons who ventured abroad on dark nights were dimly lighted by lanterns and torches.<sup>1</sup> Its condition was similar to that of London two hundred years ago, so graphically described by Macaulay, and whose description is partly given in the note.<sup>2</sup> No more forcible

<sup>1</sup> The data for this section so far as relates to Ancient Rome, are derived from Professor Lanciani's late work (1889), *Ancient Rome in the light of Recent Discoveries*. Indeed the text is simply an abridgment or transcript of those portions of his work which treat of the Sanitary Condition of Ancient Rome (chap. iii.), of Public Places of Resort (chap. iv.), and of the Police and Fire Department (chap. viii). Modern excavations and archaeological researches have enabled us to see for the first time Ancient Rome as it was, and have invested it with an interest more intense and absorbing than ever. "The principal cause of disorder was that the metropolis was kept in perfect darkness at night. Why the idea of a system of public illumination was not conceived and adopted, is a mystery hard to solve. Excavations fully confirm the fact. Not a trace of a bracket fixed to the front of a

house, or of a rope or small chain drawn across the street to support lamps or lanterns, has as yet been found, and probably none ever will be." *Ib.*, chap. viii.

<sup>2</sup> Macaulay's *History of England*, vol. I, chap. iii., entitled "The State of England in 1685." "When the evening closed in, the difficulty and danger in walking about London became serious indeed. The garret windows were opened, and pails were emptied, with little regard to those passing below. Falls, bruises and broken bones were of constant occurrence. For till the last year of the reign of Charles II. most of the streets were left in profound darkness. Thieves and robbers plied their trade with impunity; yet they were hardly so terrible as another class of ruffians. It was a favorite amusement of dissolute young gentlemen to swagger by night about the town, breaking windows, upsetting sedans, beating quiet men, and offering rude ca-

illustration of the necessity and advantages of lighting a city can be given than the pictures drawn by Lanciani and Macaulay of the state of a great city buried in the darkness of night; and they show how clearly the power to provide for this is essentially and peculiarly one pertaining to municipal rule and regulation. Nor are these studies, and the facts that they reveal, without practical value to the jurist. They demonstrate that a large and dense collection of human beings occupying a limited area have needs peculiar to themselves, which create the necessity for municipal or local government and regulation, and this in its turn the necessity for corporate organization. The body thus organized, as it has duties, so it acquires rights peculiar to itself as distinguished from the Nation or State at large, which rights, especially those that pertain to property acquired under legislative sanction, it is a mistake to suppose have nothing individual in their nature, and that they are subject to the absolute and unlimited power of the legislature. Subject they are indeed to the largest measure of legislative regulation for the general good, but not subject to absolute destruction. Modes of life, modes of thought, conceptions of rights and of duties, and the essential conditions of existence, precede constitutions, whose

resses to pretty women. I am confident that Milton was thinking of these pests when he dictated the noble lines:—

\* And in luxurious cities, when the noise  
Of riot ascends above their loftiest towers,  
And injury and outrage, and when night  
Darkens the streets, then wander forth the sons  
Of Belial, flown with insolence and wine.'

The machinery for keeping the peace was utterly contemptible. There was an Act of the Common Council, which provided that more than a thousand watchmen should be constantly on the alert in the city from sunset to sunrise, and that every inhabitant should take his turn of duty. But this act was negligently executed. Few of those who were summoned left their homes; and those few generally found it more agreeable to tiddle in the ale-houses than to pace the streets.

"In the last year of the reign of Charles II. began a great change in the police of London, a change which has, perhaps, added as much to the happiness of the body of the people as revolutions of much greater fame. An ingenious projector, named Edward Heming, obtained letters-patent conveying to him, for a term of years, the exclusive right of lighting up

London. He undertook, for a moderate consideration, to place a light before every tenth door, on moonless nights from Michaelmas to Lady Day, and from six to twelve of the clock. Those who now see the capital all the year round, from dusk to dawn, blazing with a splendor beside which the illuminations for La Hogue and Blenheim would have looked pale, may smile perhaps to think of Heming's lanterns, which glimmered feebly before one house in ten, during a small part of one night in three. But such was not the feeling of his contemporaries. There were quarters of London peopled by the outcasts of society where even the warrant of the Chief Justice of England could not be executed without the help of a company of musketeers. Such relics of the barbarism of the darkest ages [sanctuaries for criminals] were to be found within a short walk of the chambers where Somers was studying history and law, of the chapel where Tillotson was preaching, of the coffee-house where Dryden was passing judgment on poems and plays, and of the hall where the Royal Society was examining the astronomical system of Isaac Newton."

chief value is to give organic security to such antecedent and existing conditions and rights as are deemed to be vital and fundamental. Accordingly the Constitutions of the American States recognize the existence and contemplate the continuance of incorporated communities, and that they shall enjoy, in accordance with immemorial usage the right of local government; and it is a fair inference, even in the absence of special provision, that their property rights and rights of a pecuniary character are within the protection of important provisions of the State and Federal Constitutions. Constitutions are not to be interpreted alone by their words abstractly considered, but by their words read in the light of the conditions and necessities in which the provisions originated, and in view of the purposes sought to be attained and secured. Constitutions are devised not so much to create rights, as to guarantee and secure the enjoyment of those which are considered primordial and indestructible. The subject of the extent of legislative authority over municipalities and its limitations is considered in subsequent chapters.<sup>1</sup>

§ 4. After the subversion of the Roman Empire the *towns of EUROPE from the fifth to the tenth century* were in a state neither of servitude nor liberty, though their condition differed greatly in different countries. During this period the power and influence of the towns were, in general, on the decline. The power of the church was great, and the inhabitants found their chief protection in the clergy.

The *establishment of the feudal system* worked a great change in the condition of the towns. Before that, towns, as we have seen, were the centres of wealth and population. The ruling class lived within them. The land was cultivated by persons who were not recognized as having political rights. After feudalism was established this changed. The proprietor then lived upon his estates, instead of living within a town; the town became part of the lands of the lord, or enclosed within his fief. It, with its population, thus became subject to his arbitrary exactions, oppression, and pillage. Still the towns gradually prospered; with prosperity came wealth; and with wealth came power. Such, in general, was the condition of the towns of continental Europe down to the eleventh century. About this time, without any union or concert, many of them in most of the countries of Europe rose against the lords, and demanded for the burgesses, commonalty, or inhabitants a greater or

<sup>1</sup> *Post*, chaps. iv., vii., viii.



less measure of enfranchisement. Sometimes a town failed in its struggle, and its oppression was redoubled by the victorious lord. Sometimes the towns were aided by the king, who was frequently not unwilling to humble the arrogant and haughty nobility, and thereby acquire the influence and affection of those whom he had assisted. Not unfrequently, however, the struggle had to be maintained by their own unaided resources, and when successful, the result was the granting by the lords to the burghers of CHARTERS, conferring more or less extensive municipal immunities and rights. These charters, as Guizot justly observes, were in the nature of "*treaties of peace* between the commons and their lords;" were in fact, "bills of rights" for the people.<sup>1</sup> During the twelfth century "all Europe, and especially France, which for a century had been covered with insurrections by burghers against their lords, was covered by charters more or less favorable; the corporators enjoyed them with more or less security, but still they enjoyed them."<sup>2</sup>

§ 5. After the overthrow of the Roman Empire and the decay of the civilization which accompanied the Roman power, Europe became largely indebted to cities and to the authority and jurisdiction which they acquired and exercised for the creation of the third estate, — popular power, and for the development of the principles of constitutional or free government.<sup>3</sup>

THE ITALIAN CITIES, especially Venice, Genoa, and Pisa, grew rich out of the commerce resulting from the vast armies that the Crusaders for two hundred years had successively pushed forward into the Holy Land. The oppressive feudal system was at this time in full force throughout Europe. These Italian cities used their power and wealth to secure their independence. Cities and towns, as well as people who dwelt in the country, were alike sub-

<sup>1</sup> *People v. Morris*, 13 Wend. (N. Y.) 325, 334, per *Nelson, J.*

<sup>2</sup> Guizot, *History Civilization in Europe*, Lect. VII. This philosophic and valuable work is the source from whence are drawn most of the statements of the text as to the condition of the towns of Europe from the fifth to the tenth century. See similar account, *Wealth of Nations*, Book III. chap. iii.; Hallam's *Middle Ages*, chap. ii. Part II., and notes to later editions.

<sup>3</sup> "The institution of cities into communities, corporations, or bodies politic, and granting them the privilege of muni-

cipal jurisdiction, contributed more, perhaps, than any other cause, to introduce regular government, police and arts, and to diffuse them over Europe." Robertson's *Charles V.*; see Hallam's *Middle Ages*, chap. ii. Part II. M. Guizot considers the three great elements of modern civilization to be the Feudal System, the Christian Church, the Commons, or free corporate cities. *Civilization in Europe*, Lect. VII.; see also *Wealth of Nations*, Book III. chap. iii., on "The Rise and Progress of Cities and Towns, after the Fall of the Roman Empire."

ject to the arbitrary domination of their feudal masters. Some of the cities, in the eleventh century, obtained their freedom by purchase, some by force, and some by gift. They, in effect, constituted so many little republics, with the right to manage their own concerns. In this way, before the end of the thirteenth century, nearly every considerable city of Italy was enfranchised or had received extensive corporate immunities from the sovereign or lord. The happy effects were soon perceived in the increased population and improved condition. Liberty and prosperity ever go hand in hand.

§ 6. Whether from example, as asserted by Dr. Robertson, or from other causes, the same course was pursued by the cities of other states in Europe. The *King of France*, Louis le Gros, and his great barons granted many *charters of community*, by which the inhabitants were freed from feudal servitude and erected into municipal corporations, with the power of local government. These charters contained grants of new privileges, and prescribed salutary methods for the enforcement of rights and the redress of grievances. They are interesting and instructive, and a brief view of their general character is given in the note.<sup>1</sup>

<sup>1</sup> *Abstract of municipal charter in the Middle Ages.*—In those turbulent times *personal safety* was an object of the first importance, and this was usually afforded to the vassal by the baron or lord. The communities or free towns which were instituted undertook to provide for the safety of their members, independent of the nobles. For, (1) All the members were bound by oath to assist and defend each other against all aggressors. (2) All residents in a town made free were obliged to take part in the mutual defence of its members. (3) The communities could execute the judgments of their magistrates by coercion, if necessary. (4) The practice of making private satisfaction for crimes was abolished, and provision made for the regular punishment of offenders. (5) A person reasonably suspected to be about to injure another might, as with us at the present day, be compelled to give security to keep the peace. These communities also undertook to provide for the *security of property* by the following: (1) Abolishing the right of the creditor to seize the effects of his debtor with his own hand and by his private authority, and compelling him to proceed before a magistrate, who was

authorized to issue the necessary process for the seizure and sale of property, humane and necessary exemptions being allowed. (2) Every member was obliged to bring some of his property into the town, or build a house, or buy land; and in some places the members were bound for each other. (3) Judgments by magistrates, duly selected, took the place of the arbitrary and capricious decisions of the baron or feudal lord. (4) Arbitrary taxation was prohibited, and regulations for an equal tax were sometimes especially prescribed. Digested from Robertson's Charles V., Vol. I. note xvi., Proofs and Illustrations. "The communities of France never aspired," says this accurate and elegant historian, "to the same independence with those in Italy. They acquired in France new privileges and immunities; but the right of sovereignty remained entire to the king or baron within whose territories the respective cities were situated, and from whom they received the charter of their freedom." *Ib.* *Charters defined, post*, secs. 32, 32. Municipal charters, treated of, *post*, chaps. v., vi. Outline of modern municipal charters in the United States, *post*, sec. 39.

We meet in FRANCE with great diversity in the origin and government of towns and cities. In some of them, especially in southern France, the *Roman municipal system*, more or less modified from time to time, was perpetuated. The Roman system was formed upon an aristocratic model. In each *municipium* there was a senate, called an *ordo* or *curia*. This was, politically considered, the city; it was the governing body. The mass of the population, except in a few cases, had no voice in municipal affairs. This senate was composed of a comparatively small number of families, and the office was hereditary. When the body became reduced in numbers by death or otherwise, it was not filled by the people, but by the survivors. Other towns or communities originated, in the most natural manner, upon the fiefs or estates of the feudal proprietors. Many of these estates became centres or agglomerations of population, composed of the working and industrial classes. Trade sprang up, and towns and cities originated. The lord, or proprietor, was interested in and derived profit from their prosperity. To induce others to settle there, he frequently conceded certain privileges. He did not emancipate them from all feudal restraints and burdens, but these he mitigated. Often he granted lands and privileges to all who settled in towns on his domains, on receiving a moderate fixed rent and specified military services. These concessions had no higher origin than the personal interest of the proprietor, and were often violated. They did not constitute the towns locally independent, or make them true corporations. But, limited and uncertain as these concessions were, the towns which received them prospered and became more or less important.

Other places in FRANCE were chartered towns and true corporations. In the twelfth century there was the general movement, before noticed, on the part of the towns of France for their enfranchisement, or delivery from feudal bondage. The extent of this movement may be judged from the fact that the *royal* charters of this period are numbered by hundreds, and those granted by the *lords*, by thousands. These were, in general, wrested from the feudal proprietors by force, or the fear of it, and conferred an almost independent political existence upon the *commune*, or town. These charters gave the community the power of having its people judged for offences by magistrates of their own choosing; crimes and punishments were defined; arbitrary rents and taxes were abolished, and fixed rents and regular taxes substituted; *main-morte* and other restraints upon the alienation and enjoyment of property were removed. The government of towns thus created, unlike those which were mere perpetuations of the Roman system, was formed upon a *demo-*

*cratic* model. A voice was given to all burghers, or persons of a certain fortune, or who exercised a trade or calling. In a word, with considerable diversity, this class of towns was independent, and possessed, in local matters, the power of self-government. From and after the fourteenth century, the political power and influence of the towns of France decayed. The causes of this decline have been traced with a masterly hand by M. Guizot, but they do not relate to our purpose.<sup>1</sup> In the course of change, we may remark that the royal power over them became predominant, and instead of being self-governed, they were administered by the intendants, or officers of the king or emperor, or the central authority at Paris.

Towns, or *communes* in modern FRANCE are governed by a mayor and council. By the law of 1855, in all *communes* of 3,000 inhabitants and upwards, these officers are appointed by the emperor; while in small *communes* the appointment is made by the prefect of the department, himself appointed by the emperor. The prefect may suspend municipal councillors, but the emperor alone can dismiss them.<sup>2</sup> Under the present republic the prefect is appointed by the president; and in the larger towns the mayor is nominated by the government at Paris, but he must be selected from the municipal council, which is chosen by universal suffrage.<sup>3</sup>

§ 7. It seems to be well established that the *towns and cities* of SPAIN acquired charters of freedom at an earlier period than those in France, England, or Germany.<sup>4</sup> The cities of Italy, as we have seen, owed their freedom, to a large extent, to their commercial importance and wealth; but those of Spain owed their privileges

<sup>1</sup> History Civilization in France, Lect. XIX.; see also Hallam's Middle Ages, chap. ii. Part II., and notes.

<sup>2</sup> American Encyclopædia, *Commune*.

<sup>3</sup> Encyclopædia Brit. (9th ed.), 509, 511, title *France*.

<sup>4</sup> The most ancient of these regular charters of incorporation now extant was granted by Alfonso V., in 1020, to the city of Leon and its territory. It preceded by a long interval those granted to the burgesses in other parts of Europe, with the exception, perhaps, of Italy. Acts of enfranchisement became frequent in Spain during the eleventh century, several of which are preserved, and exhibit with sufficient precision the nature of the privileges accorded to the inhabitants. Robertson (in his History of

Charles V., Introductory View), who wrote when the constitutional antiquities of Castile had been but slightly investigated, would seem to have no authority, therefore, for deriving the establishment of communities from Italy, and still less for tracing their progress through France and Germany to Spain. Prescott, Ferdinand and Isabella, Introduction, Vol. I. note 24.

Hallam, who, as well as Prescott, founds his judgment upon the historical works of Marina and Sempere, expresses a similar opinion as to the early period at which the towns of Spain were invested with chartered rights and privileges. Middle Ages, chap. iv.; Ib. chap. ii. Part II. and notes.

and jurisdiction to an entirely different cause. For nearly eight hundred years the Gothic inhabitants of Spain had been engaged in an almost uninterrupted struggle against the Moors, who occupied the southern part of the peninsula.<sup>1</sup> It was obviously the dictate of policy, as the Spaniards gradually narrowed the boundaries of their enemies' territory, to make provision for securing and holding the ground thus gained. With this view, and for the purpose of protecting themselves from the frequent raids of their Arab neighbors, liberal charters were granted to towns, with extensive districts of country subject to their municipal jurisdiction.

By these grants or charters the citizens selected their own officers, including judges and a common council, and enjoyed many of the essential rights of freemen. In return, the community or city paid a certain (no longer an arbitrary) tax or rent, and owed military service. For more effectual protection, the charters frequently prohibited the nobles from acquiring real property or erecting fortresses or palaces within the limits of the community, and subjected them to its jurisdiction when within its territory. Large sections of the adjacent country, as we have said, often embracing towns and villages, were annexed to the city or community and placed under its laws and jurisdiction. "Thus," says Mr. Prescott,<sup>2</sup> to whom we are indebted for this sketch of the early municipalities of Spain, "while the inhabitants of the great towns in other parts of Europe were languishing in feudal servitude, the members of the Castilian corporations, living under the protection of their own laws and magistrates in time of peace, and commanded by their own officers

<sup>1</sup> Mr. Irving's fine reflections, in his *Alhambra*, upon this protracted and famous contest between the Crescent and the Cross, are not inappropriate: "The singular fortunes of the Arabian or Morisco-Spaniards form one of the most anomalous yet splendid episodes in history. A remote wave of the great Arabian inundation cast upon the shores of Europe, they seem to have all the impetus of the first rush of the torrent. But repelled (by unsuccessful battle) within the limits of the Pyrenees, they gave up the Moslem principle of conquest, and sought to establish in Spain a peaceful and permanent dominion. Generation after generation, century after century passed away, and still they maintained possession of the land. With all this, however, the Moslem empire in Spain was but a brilliant exotic that took no per-

manent root in the soil it embellished. Severed from all their neighbors in the west by impassable barriers of faith and manners, and separated by seas and deserts from their kindred of the east, the Morisco-Spaniards were an isolated people. Their whole existence was a prolonged, though gallant and chivalric, struggle for a foothold in a usurped land. They were the outposts and frontiers of Islamism. The peninsula was the great battle-ground where the Gothic conquerors of the north and the Moslem conquerors of the east met and strove for mastery; and the fiery courage of the Arab was at length (after eight hundred years) subdued by the obstinate and persevering valor of the Goth."

<sup>2</sup> History Ferdinand and Isabella, Vol. I., Introduction, sec. 1.

in war, were in full enjoyment of all the essential rights and privileges of freemen."

§ 7 a. The *modern municipal institutions of PRUSSIA* and their workings are full of interest and instruction. The aim has there been to embody the principle of local self-government, with central limitations upon the exercise of certain of the more important powers. They are so constructed as to attempt to give to the citizen such a method of government as will enlist the best character and talent in the service of the municipality, and yet prevent it from inconsiderately engaging in enterprises which might unduly burden it with obligations too great to be borne. The scheme of organization gives to the municipality very general powers, with the limitation on the exercise of many of them, that they shall be approved by some superior administrative officer of the central government. This administrative control over the acts of the municipality does not in practice seem to be carried to so great an extent as the control actually although irregularly exercised by the State legislatures over our American municipalities; so that although the municipal administration is apparently more centralized than here, the Prussian cities in fact enjoy, it is said, a greater degree of freedom from central interposition than with us. In order to ensure the services of the best citizens, penalties are imposed on those who refuse to serve for at least half of the time for which they have been elected or appointed, that they shall lose their municipal suffrage and have their taxes increased. Suffrage, though very general, is not universal. A small property qualification is required, which may consist in the payment of taxes. But in order to give *property* a certain degree of influence or control, the voting population is divided into three classes: the first consisting of the largest taxpayers, who pay a third of all the direct taxes; the second class consisting of the next largest taxpayers, who pay the next third of the taxes; the third class consisting of the remaining taxpayers. Each of these classes elects a third of the members of the municipal council. This system is similar to that adopted in elections to the Prussian diet; and it is represented to work satisfactorily, and to account in a large measure for the great success of the municipal government of the Prussian cities.<sup>1</sup>

<sup>1</sup> See Political Science Quarterly, Vol. III., December, 1888, p. 714, where Mr. Goodnow reviews Steffenhagen's *Handbuch der städtischen Verfassung und Verwaltung in Preussen*.

An enlightened observer (Professor Ely)

has recently given it as his opinion that Berlin is the best governed large municipality in the world. Opinions may differ whether this high eulogium is merited; but undoubtedly it is a well governed city. The essential features of its municipal

§ 8. BRITAIN was one of the last conquests of the Cæsars, and was one of the first of the western provinces upon which they released their hold. The Latin language did not become the language of the people; nor did the Romans, as in many of the continental provinces, fill the country with memorials of their skill and arts. The impressions made by the mastery of the Roman were not destined to be permanent. According to an accurate explorer and philosophic modern historian,<sup>1</sup> Britain, when subject to Rome, was divided into thirty-three townships, with a certain share of local self-government; and *quasi* municipal institutions, for a long time after the withdrawal of the Roman power, constituted whatever of government the people possessed. At the time of the conquest of England by William of Normandy (A. D. 1066) the towns and

organization are in substance stated by Mr. Baxter (lecture on Berlin) as follows:

All male persons of the age of twenty-four, who pay a tax on an income of \$150, obtain the electoral franchise upon a year's residence. Over ten thousand citizens take part in the administration of municipal affairs. The most distinguished and substantial citizens consider it an honor to do so. Penalties are imposed for a refusal to serve in any position to which a citizen may be elected. The municipal assembly is composed of 126 members, representing 326 wards. One-half at least must be house-owners. The members are chosen for six years, one-third retiring every two years, thus giving permanency to the governing body by making the changes gradual. This body controls the affairs of the city. It chooses, also, the upper branch of the city government, known as the magistracy, composed of the mayor and the board of aldermen, 32 in number, 15 of whom are salaried, and 17 are honorary members. The term of the mayor is twelve years; the salary about \$7,500. It is regarded as a position of high honor. The salaried aldermen are elected for twelve years by the municipal assembly, with special regard to their qualifications. Their salaries are higher than those of the local judges. The custom is to re-elect good men. The term of the unpaid aldermen is six years, and they are usually chosen from men who have distinguished themselves for efficient public service. Voters who elect the municipal assembly are

divided into three classes, as stated in the text. The result is that a majority of the assembly is chosen by a minority of the voters. The next feature, so far as our observation goes, is almost wholly unknown in this country. These two chambers are supplemented in Berlin by a body of 70 citizen deputies, selected by the municipal assembly from leading citizens, to serve in joint committees for the administration of special affairs, such as the relief of the poor, schools, &c. At the meetings of these committees an alderman acts as chairman. Under this executive staff of 230 members, all honorary officials and men of independent means, there is a large staff of paid officials, appointed for life, as is the rule in the German civil service. The police is administered by the State instead of the city, the force consisting of about 3,000 men. The expense (about \$400,000 a year) is borne by the city. The streets of Berlin are now taken care of by the city instead of the State, which up to 1874 had the maintenance. The revenue of the city, so far as raised by taxation, comprises an annual income tax of three per cent on all incomes above a certain amount; house rent and tax, divided between landlord and tenant; and various minor special taxes. The net debt of the city is about four millions, a decrease of nearly two millions since 1876. This is a striking contrast to New York, whose debt is over one hundred millions.

<sup>1</sup> Sir James Mackintosh, *History of England*, Vol. I. p. 30.

boroughs were dependent upon the uncertain protection of the king or lord, to whom they owed rents or service, and were liable to discretionary, that is, arbitrary rates or talliages. They were not incorporated, and did not constitute bodies politic; and being composed mainly of tradesmen and the lower classes, were regarded by their feudal masters as possessed of no political and of but few civil rights. None of them enjoyed the right of representation in the council of the nation, and, with the exception perhaps of London and a few of the greater towns, did not have the right of internal or self-government. Sometime between 1100 and 1125 Henry I. granted to London the original charter, in which were conferred many valuable municipal privileges, with the right, among others, to choose certain of their own officers, such as sheriff, justice, and the like.<sup>1</sup> But the *right of local self-government* was not, in general, conferred upon towns and boroughs until the time of John, who reigned from 1199 to 1216.<sup>2</sup> Meantime the towns and cities continued to grow in population and wealth, and as these increased, their disposition to submit to arbitrary exactions proportionately diminished, and their independent spirit and desire for freedom from oppressive restraints became more manifest; but still they did not acquire sufficient influence or importance to be allowed a representation in the states of the kingdom for more than two centuries after the Conquest.<sup>3</sup> It was not until the time of Edward I. that cities and boroughs, then mostly incorporated, obtained the right of returning members to parliament. The legislative power of the kingdom was at this time vested in the king and the council, afterwards called the parliament. This council was constituted of the spiritual and lay peerage. The commonalty of England had no voice or part in the legislature. This wise and politic prince was greatly distressed for money, and instead of attempting to raise it by the levy of arbitrary taxes,

<sup>1</sup> This famous charter has no date. Its substance is given in Norton's Commentaries on the History, Constitution, and Chartered Franchises of the City of London; and its various provisions explained and commented on. Book II. chap. ii. p. 337. In the latter clause of this charter is an allusion to the very ancient custom of foreign attachment, in which is to be found the germ of all our foreign attachment laws. Pulling, Laws, etc., of London, 188; Hallam, Middle Ages, Vol. III. ch. viii. Part III. Mr. Norton gives the substance of all the charters of London from the time of William the Conqueror to the present.

<sup>2</sup> Hallam, Middle Ages, Vol. III. chap. viii. Stephen thus describes the municipal institutions of England in the time of John: "The principal liberties granted in the early charters are exclusive jurisdiction, a merchant guild, the appointment of the various officers for the administration of justice, fairs and markets, with freedom from all tolls; in fact all of the privileges granted by the borough charters were of a local character in every respect."

<sup>1</sup> English Constitution, chap. iii. p. 62.

<sup>3</sup> "It is clear that at Runimede no representatives of cities or boroughs were present." 1 Stephen, English Constitution, chap. iii. p. 71.



which were submitted to with murmurs and yielded sparingly, preferred to obtain it by the prior voluntary consent of the cities, towns, and boroughs.<sup>1</sup> Accordingly he caused writs to be issued to about one hundred and twenty cities and boroughs, enjoining them to send to parliament, along with the two knights of the shire, *two deputies from each borough within their county*, with authority from their respective communities to consent to what the king and his council should require of them. As the experiment proved successful, more money being obtained, and with less trouble, than in the former way, the practice was continued. And this, according to the best opinions of learned and careful inquirers,<sup>2</sup> is the definite commencement of popular representation, and of the House of Commons itself, the latter constituting, as Macaulay well observes, "the archetype of all the representative assemblies which now meet, either in the old or new world."<sup>3</sup>

The political powers thus acquired by boroughs and cities gave them political importance. This power was courted and controlled by the crown. The king's judges decided that no corporation was valid without the sanction of the king, and most of the corporations from time to time applied to the crown for a grant or confirmation of privileges. Their dependence upon the crown was thus established, and the crown, as a check upon the nobles, encouraged *popular elections* by the *whole corporate assembly*.<sup>4</sup> In the course of time

<sup>1</sup> "In words that well became the noble King of a free people he acknowledged that 'what touched all should be approved by all.'" Prof. Hearn, *Government of England*, chap. xv. sec. iii. p. 423.

<sup>2</sup> Hallam, *Middle Ages*, Vol. III. chap. viii.; 1 Stephen, *Eng. Const.* chap. iii. p. 95 *et seq.*; Hearn, *Government of England*, pp. 428, 480, 539; Hume, *England*, Vol. I. App. II.; Dr. Adam Smith, *Wealth of Nations*, Book 3, ch. iii., whose account of the condition of the towns and boroughs at this period, and the decay of the power of the lords and the growth of the power of the inhabitants of the cities is, though brief, perspicuous and satisfactory. Norton, *Com. Lond.* 109. A distinctive feature of *boroughs*, in England, is the right of the borough to elect members of parliament. There the term "borough" includes cities as well as villages, but in the United States the term "borough" is not in very general use, and, when used, designates an incorporated

village or town, but not a city. American Cyclopædia, title, *Borough*.

<sup>3</sup> History England, Vol. I. chap. i.; "The Crown! it is the House of Commons!" said an English statesman in 1858; and the recent history of Great Britain, in several memorable instances, shows that against the declared and positive determination of the commons neither the crown nor the lords, in any struggle relating to popular rights, can make effectual resistance. In the United States all departments of the government ultimately respond, of course, to the public will, which is here the real sovereign power, and elects at short periods the executive and legislative branches.

<sup>4</sup> An English municipal corporation, as will be explained hereafter, consisted usually of one or more select or definite bodies, and an indefinite body, the latter being generally composed of the burgesses or citizens, that is, the inhabitant householders; and a corporate assembly was a meeting of all the bodies, and not of the

it was found that these representatives were more formidable to the power of the crown than the nobility had been. In Elizabeth's reign compliant judges decided that, although the right of election was, by the original constitution or charter, in the whole assembly, still from *usage*, even when within the time of memory, a by-law may be *presumed* giving the right of election to a select class (more readily controlled by the crown) instead of the whole body.<sup>1</sup>

Afterwards, to increase the power of the crown, James incorporated towns or boroughs, endowing them with the parliamentary franchise, but confining the exercise of the right to vote to select classes. The immense power of popular representation was a most active agency in the overthrow of Charles I. This power proving inimical to the arbitrary schemes of the Protector, he expelled the members by violence, and subdued their authority in parliament by force. He then secured this power in his own favor by expelling all hostile magistrates and officers and supplanting them with others of his own creation.

On the Restoration, Charles II. found the principal opposition to the court to come from the cities and boroughs. He commenced his reign by reconstructing the corporations and filling them with his own creatures. Judges, also creatures of the king, holding commissions during his pleasure, aided him in his scheme to acquire absolute control over the corporations of the realm. London, as the largest and most influential, was selected as an example, and in 1683 the famous *quo warranto* was issued against the city to deprive it of its charter, for two alleged violations, one of which was stale and both were frivolous. Judgment passed, of course, against the city, and its ancient charter was abrogated.<sup>2</sup> As a condition of its restoration, it was, among other things, provided that thereafter the mayor, sheriff, clerk, &c., should not exercise their office without the king's consent; and that if the king twice disapproved of the officers elected by the corporation, he might himself appoint others. In short, the city was deprived of the right of choosing its own officers, and was made dependent upon the crown. Such also was the fate of most of the considerable corporations in England. The whole power was in the hands of the king.<sup>3</sup>

select or definite bodies alone. *Post*, sec. 35.

<sup>1</sup> Willcock on Municipal Corp. § 3; 3 Hallam, Const. History, 52; 1 Stephen, English Const., chap. vi. p. 277 *et seq.*

<sup>2</sup> *Rees v. City of London*, Mich. 33 Car. II.; 2 Show. 262, Pulling, Laws, &c. of London, 14. The history of the

seizure of the city franchises, by virtue of the writ of *quo warranto*, is given at some length by Norton, Com. on the History, &c. of London, Book I. chap. xx.; see also *The Case of the City of London*, 3 How. State Trials, 1340 *et seq.*

<sup>3</sup> There were eighty-one *quo warranto* informations brought against municipal

Nor were these arbitrary proceedings confined to England. In 1683 writs of *quo warranto* and *scire facias* were issued for the purpose of abrogating the *charter of MASSACHUSETTS*. Patriotism and religion mingled their fervors and combined in its defence, but in vain. Servile judges, in June, 1684, one year and six days after judgment against the city of London, adjudged the charter to be conditionally forfeited. The charter government was displaced, and popular representation superseded by an arbitrary commission. In 1687 similar writs were issued against the charters of Rhode Island and Connecticut; when, as is well known, the people of the latter colony unsuccessfully endeavored to preserve this cherished muniment of their liberties by concealing it in the charter oak. The colonies, as a result of the English Revolution of 1688, had their charters restored. Very shortly after the accession of William and Mary a bill to restore the rights of those English corporations which had surrendered their charters to the crown during the reigns of James II. and Charles II. was introduced into parliament, and became a law, with the general applause of men of all parties.<sup>1</sup>

Reference has already been made to the fact that in the time of Elizabeth, the controlling power of corporations was virtually vested in "select bodies." The abuses in the corporations arising out of select bodies continued after the revolution of 1688, and until act of parliament in 1835, next to be mentioned.<sup>2</sup> To remedy these and many other abuses, the MUNICIPAL CORPORATIONS REFORM ACT (5 and 6 Will. IV. ch. 76, A. D. 1835) (referred to more fully in a subsequent chapter<sup>3</sup>) was passed. This statute sought to restore corporations to their original design, as institutions for the local government of the place, to be controlled by those interested in it, and not by a favored few. It is undoubtedly true, as remarked by Mr. Hallam, that "no political institution can endure which does not rivet itself to the hearts of men by ancient prejudice or acknowledged interest." That is, it cannot permanently endure, although it may exist long after it ought to cease. If ever an institution outlived its usefulness — lived long after it became a positive evil — it was the municipal corporations of England, prior to the reform act of 1835. In many important places in England the number of corporators ranged as low as from ten to thirty. In a large majority of the municipalities, the corporations were close; that is, the govern-

corporations by Charles II. and James II.  
2 Chandl. Com. Debs. 316; 1 Stephen,  
English Const. chap. viii. p. 455.

<sup>2</sup> 1 Stephen, Eng. Const. chap. vii.  
p. 479.

<sup>1</sup> Macaulay, History of England, Vol.  
III. chap. xv., where a graphic account of  
the history of its passage is given.

<sup>3</sup> Chap. III. *infra*, secs. 35, 36, and  
note.

ing body had the power to determine who should be admitted to freedom or membership; and often the privilege was conferred upon non-residents and the residents excluded. The most important franchise they possessed was that of electing members of parliament, and this, in many places, was the principal function of the corporation. Not only were the councils self-elective, but their tenure was for life. They were frequently controlled by a single party, and all persons entertaining other opinions were excluded. The corporations were not in sympathy with, nor did they reflect the wishes of, the people over whom they exercised local jurisdiction. There was no check upon mal-administration. The property was wasted; extravagance characterized the expenditures of money; officers were elected by the irresponsible councils from favoritism or devotion to party.<sup>1</sup> One of the first acts of the Reformed House of Commons was the overthrow, in 1835, of this intolerable system, by the passage of the above-mentioned Municipal Corporations Statute,<sup>2</sup> to which we shall have frequent occasion to refer in the subsequent pages of this work.

Lord Brougham has many claims to the regard of posterity. Few of these are stronger, however, than those which arise from his faithful and effective services in promoting the reform of the Municipal Corporations of Great Britain, by abolishing these self-elected and perpetual councils, by organizing the corporations upon a uniform model, and by establishing in the act the principle that the councils should be selected for short and fixed periods by the votes of the burgesses, thus recognizing and adopting the representative system based upon the vote of persons actually interested in the municipality. Mr. Willcock, in concluding his treatise,<sup>3</sup> had recommended a

<sup>1</sup> Glover on Corp. xxxviii. *et seq.*; Report of Commissioners of Corporate Inquiry, 32 *et seq.* On January 1, 1833, the *Municipal Corporations Act of 1832* (45 and 46 Vic. chap. 50) went into force, repealing, re-enacting, and consolidating the previous Acts. *Post*, sec. 35.

<sup>2</sup> *Post*, sec. 35, note, where the leading provisions of this important enactment are given.

<sup>3</sup> Willcock, *Municipal Corp.* 513, 514. London, with its "great and notable franchises, liberties, and customs," to treat of which, says Lord Coke (4 Inst. 250), "would require a whole volume of itself," was not embraced in the general act of 5 and 6 Will. 4, chap. 76, but there was subsequently passed an important statute

known as the London Corporation Reform Act of 1849. See Supplement to Pulling's *Laws, &c.*, of London.

On the 15th day of August, 1867, after a memorable struggle between the lords and the commons, what is known as the *Disraeli Reform Bill* became a law, by which the right to vote for members of parliament for boroughs was greatly extended. This right was, in boroughs, extended to all occupiers of dwelling-houses which were rated to the poor rates, and to lodgers occupying lodging-houses of the annual value of £10, unfurnished. It practically enfranchised the working class.

Referring to the English system of corporate local government and administra-

similar reform, but disclaimed being so visionary as to suppose it would soon be effected, since parliament would not willingly relinquish its influence over venal boroughs, and members elected by corporations would not be allowed by their constituents to abandon their ancient though unjust privileges; but within ten years from the time his language was written, the reform of which he almost despaired was accomplished. Fifty years' experience has vindicated its wisdom.

§ 8 a. Coming now, in this general survey, to the *municipal institutions of the UNITED STATES*, the great fact which first meets our view is that the common law is the basis of the laws of every State and Territory of the Union, with comparatively unimportant exceptions. It is indeed a most fortunate circumstance, that, divided as our territory is into so many States, each supreme within the limits of its power, a common and uniform general system of polity underlies and pervades them all. The common law, as well as the institutions which it developed or along side of which it grew up, IS PERVADED BY A SPIRIT OF FREEDOM, *which distinguishes it from all other systems and peculiarly adapts it to the institutions of a self-governed people.* It is established by the learned researches which have been more recently made that the germs and elements of this law and of English polity are of Germanic origin.<sup>1</sup> The Saxon conquerors of Great Britain were not mere bodies of armed invaders. They went to England, during two or more centuries, in families and communities. What manner of men were they? Guizot dwells upon the fact that the distinguishing character of the Germans was "their powerful sentiment of personal liberty, personal independence and individuality." He affirms and repeatedly reiterates, that it was they who "introduced this sentiment of personal independence, this love of individual liberty, into European civilization; that this was unknown among the Romans; unknown in the Christian Church; and unknown in nearly all the civilizations of antiquity. The liberty which we meet with in ancient civilizations is political liberty, — the liberty of the citizen, not the personal liberty of the man himself."<sup>2</sup>

§ 8 b. Thus conquering and colonizing England, the Saxons carried with them "from lands where the Roman eagle had never been seen, or seen only during the momentary incursions of Drusus and

tion, Mr. Gladstone declared that "Our municipalities produce qualities which are the best safeguards of England's greatness." Williams & Vine, *English Munic. Code*, p. 12.

<sup>1</sup> Stubbs, *Const. Hist.* chap. i. *et seq.*; Prof. Adams, *Germanic Origin of New England Towns*, in *Johns Hopkins University Studies*.

<sup>2</sup> *Hist. Civ. Europe*, Lect. II.

Germanicus,"<sup>1</sup> their language, their religion, their customs, their laws, and their organizations. These were indigenous, — homebred, without trace or tincture of the Roman law and institutions.<sup>2</sup> They borrowed nothing from antiquity or from surrounding peoples. They founded, and in the course of centuries their successors and descendants, the people of England, built up their institutions on their own model. Macaulay speaks of this with his accustomed vividness: "The foundations of our Constitution," he says, "were laid by men who knew nothing of the Greeks, but that they had denied the orthodox procession and cheated the Crusaders; and nothing of Rome but that the Pope lived there. Those who followed contented themselves with improving on the original plan. They found models at home; and therefore they did not look for them abroad."<sup>3</sup> This love of personal freedom and independence was impressed upon the institutions they founded, or adopted, or modified.

§ 8 c. Learned investigators differ concerning the extent to which Roman law existed and prevailed at the time of the Saxon conquest, and the extent to which it was adopted or incorporated into the English laws, usages, and institutions. But there is a general assent to these propositions, viz.: that the *Saxon spirit of freedom was embodied in the various local courts*; that it was in these popular tribunals that the principles of law and local government were cultivated and disseminated; that the Saxons breathed into the English government and institutions "a spirit of equity and freedom which has never entirely departed from them,"<sup>4</sup> and that in the course of time the common law intertwined its roots and fibres inseparably into the constitution, polity, local and municipal institutions, the civil and criminal jurisprudence, the family relation, and the rights of person and of property. So, as we have above seen, from an immemorial or early period the local territorial subdivisions of England, such as shires, towns, and parishes, enjoyed a degree of freedom, and were permitted to assess upon themselves their local burdens and to manage their local affairs. The ratepayers were thus dignified by being an integral part of the communal life; the foundations of municipal liberty were laid; administrative power was decentralized; knowledge of the laws and reverence for and obedience to them were constantly taught by a participation in their administration and enforcement. This was exactly the opposite of the systems which concurrently prevailed on the Continent, where the central

<sup>1</sup> Digby, *Real Prop.* 11, 12.

<sup>2</sup> Freeman, *Norman Conquest*, chap. i.

<sup>3</sup> *Essay on History*.

<sup>4</sup> Mackintosh, *Hist. Eng.* Vol. V. chap. i.; Reeves, *Hist. Com. Law*, Introduction by Finlason.

power absorbed, governed, regulated everything, thereby destroying municipal freedom and the capacity to enjoy and exercise it, as well as the power to defend and preserve it.

§ 8 d. Our ancestors *in the settlement of this country* brought with them these notions of English liberty and polity, and they found here a field of unexampled extent for their free development. Accordingly the system of intrusting the direction of local affairs to the local constituencies, has from the earliest colonial periods been carried by us to a much greater extent than in England.<sup>1</sup> As you pass from one end of this country to the other, alike in the older regions and in the newest organized settlement, you find the affairs of each road-district, school-district, township, county, town and city, locally self-managed, including the administration of local justice. Every township in the United States has a local court with power to summon a jury of the vicinage, thereby bringing justice home to the business and bosoms of the people, and making it their own affair. It is in no slight degree instructive, and certainly in the highest degree interesting, to trace the institutions of this new country back to their germs in the Saxon or Anglo-Saxon polity; for when we touch to-day, even in our frontier settlements, the electric chain wherewith Providence hath bound the ages and the generations of men together, we discover that we are in historic communion with rude and remote ancestors although separated from us by seas, mountains, and centuries.

Each State binds together the local institutions which it creates and regulates independent of Federal control; thus happily preventing a concentration at the national centre of the power and duty of legislating for and regulating the affairs of local communities throughout a country of such extent, that with its exact situation, wants, and interests, it would be impossible for Congress to become adequately acquainted. So, in the ascending scale, THE FEDERAL CONSTITUTION constitutes the States and the people thereof into a National Government. It defines the relations of the States to each other and to the national government, and limits the power of the States to deprive any citizen, however humble, of the great essential rights of freedom and equality before the law.

MAGNA CHARTA remains to-day one of the main foundations of English liberty.<sup>2</sup> Its chief glory is the provision "that no freeman

<sup>1</sup> *Post*, sec. 45, note.

<sup>2</sup> "The whole of the constitutional history of England is little more than a commentary on Magna Charta." (Stubbs,

Const. Hist. Vol. I. chap. xii.) Magna Charta "is the keystone of English liberty." (Hallam, Middle Ages, Vol. II. chap. viii.)

shall be imprisoned or disseized of his freehold, but by the lawful judgment of his peers or the law of the land." This memorable provision, which was from the first embodied in all of the State Constitutions, has been carried into the Federal Constitution,<sup>1</sup> thereby placing the rights of life, liberty and property, as against invasion by the States, under the protection of the national authority.

§ 9. In general, all of our AMERICAN cities, towns, and counties are *public corporations, full or quasi*. They are created by the legislature, and are invested with power to decide and control local and subordinate matters pertaining to their respective localities. The number and freedom of these local organizations, whereby political power is exercised by the citizens of the various local subdivisions of a State who have a right to vote and to regulate their own domestic concerns, constitute a marked feature in our system of government.<sup>2</sup> They are simply the administrative form of the fundamental American idea of government, viz., that the *people are the source of all political power* and have the right to exercise it. This is with us no mere rhetorical declamation, but a foundation principle upon which our political institutions rest. As local matters can better be regulated by the people of the locality than by the central power, we provide that each road-district, each school-district, each city and each county shall, as to its local concerns, be self-governed. These organizations are, of course, subject to the legislature of the State, and their acts, if in violation of law or where they affect private rights, are also subject to judicial cognizance and judgment. They are under the law and are bound to obey it. The policy of creating local public and municipal corporations for the management of matters of local concern, runs back to the earliest period of our colonial history, is exhibited in all our legislation, and expressly or impliedly guaranteed in our State constitutions.<sup>3</sup> "It is a fundamental principle in this State, recognized

<sup>1</sup> Amendment XIV.

<sup>2</sup> "In all *quasi* corporations, as cities, towns, parishes, school-districts, membership is constituted by living within certain limits." Per *Shaw*, C. J., *Overseers of Poor, &c., v. Sears*, 22 Pick. 122, 130; *Hill v. Boston*, 122 Mass. 344, 356 (1877); s. c. 23 Am. Rep. 332. *Post*, sec. 40.

"When a man," says Mr. Justice *Morton*, *Oakes v. Hill*, 10 Pick. 333, 346, "moves into a town, he becomes a *citizen* thereof (if possessed of the requisite qualifications as to age, &c., and if he remains

the requisite length of time) whatever may be the desire of himself or the town." See *post*, chaps. ii. and iii.; *People v. Canada*, 73 N. C. 198; s. c. 21 Am. Rep. 465. *Post*, sec. 195.

<sup>3</sup> *Kent*, Com. 275; *Cooley*, Const. Limit. chap. viii. See also this learned author's opinion in the Supreme Court of Michigan, in the *People v. Hurlbut*, 24 Mich. 44, (1871); *State v. Noyes*, 10 Fost. 30 N. H. 292; *Bow v. Allentown*, 34 N. H. 351; s. c. 9 Am. Rep. 103, and in *People v. Detroit*, 28 Mich. 228; s. c. 15 Am. Rep.



and perpetuated by an express provision of the Constitution, that the people of every hamlet, town, and city of the State are entitled to the benefits of local self-government."<sup>1</sup>

The elective franchise is not, as was the case until the comparatively recent reform legislation in England, a privilege dependent upon custom or usage, or confined to certain classes, but is uniform and universal, extending to *all* of the adult male citizens. Old Sarums and rotten boroughs, as well as property qualifications, are unknown. The effect of this policy of establishing cities, towns, and districts of country into bodies politic, and investing the citizens thereof with the power of self-government in respect of their local affairs, has, upon the whole, been most happy. One of the most philosophical and fair of foreign observers<sup>2</sup> was much struck

202. *Post*, secs. 58, 73. Text approved. *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.), 425. *Caldwell v. Justices, &c.*, 4 Jones (N. C.) Eq. 323; *Comw. v. Roxbury*, 9 Gray, 503, 510, 511, note written by Mr. Gray, afterwards the Chief Justice of the Supreme Judicial Court of Massachusetts, and now one of the Justices of the Supreme Court of the United States; *Webster v. Harwinton*, 32 Conn. 131; *People v. Albertson*, 55 N. Y. 50 (1873). *Post*, sec. 58. In Mr. Quincy's *Municipal History of Boston*, chap. i., will be found an interesting *historical account of the constitution of towns in Massachusetts*, and of their mode of organization and operation, particularly of the town of Boston. *Post*, sec. 28.

<sup>1</sup> Per *Cooley, J.*, in *People, ex rel. Park Comm'rs* (Detroit Park Case), 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202, referred to *post*, secs. 72, 73.

<sup>2</sup> M. De Tocqueville, *Democracy in America*: "Local assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty." M. De Tocqueville's *Democracy in America*, chap. v. *Post*, sec. 28, note.

"From time immemorial," says one of the ablest of American common-law judges, "the counties, parishes, towns, and territorial subdivisions of the country have

been allowed in England, and, indeed, required, to lay rates on themselves for local purposes. It is most convenient that the local establishments and police should be sustained in that manner; and, indeed, to the interest taken in them by the inhabitants of the particular districts, and the information upon law and public matters generally thereby diffused through the body of the people, has been attributed by profound thinkers much of that spirit of liberty and capacity for self-government, through representatives, which has been so conspicuous in the mother country, and which so eminently distinguishes the people of America. From the foundation of our government, colonial and republican, the necessary sums for local purposes have been raised by the people or authorities at home. Court-houses, prisons, bridges, poor-houses, and the like are thus built and kept up; and the expenses of maintaining the poor, and of prosecutions and jurors, are thus defrayed, and of late (in North Carolina) a portion of the common-school fund, and a provision for the indigent insane, are thus raised, while the highways are altogether constructed and repaired by local labor, distributed under the orders of the county magistrates. When, therefore, the Constitution vests the legislative power in the General Assembly, it must be understood to mean that power as it had been exercised by our forefathers, before and after their migration to this continent." Per *Ruffin, J.*, in *Caldwell v. Justices, &c.*, 4 Jones (N. C.) Eq. 323 (1858).

with the institutions of New England towns; and considered them as small independent republics in all matters of local concern, and as forming the principle of the life of American liberty existing at this day.<sup>1</sup> Not only the New England towns, but the underlying and universal prevalence of local government and administration, rural and urban, throughout the United States, and its effect upon the general life and well-being of the American people, have been not only noticed but intelligently described and enforced in a late work of great interest and value, by a distinguished English writer, who criticises freely indeed, but with no conscious bias and with no unfriendly spirit.<sup>2</sup>

§ 10. The *value of our system of municipal institutions*, to which we have thus alluded, may be seen on comparing the political condition of the people of the United States with that of the people of modern France,—selected as a fair example of a government without municipal freedom. France is a highly centralized government. The state there is everything. Municipal institutions, with the power of independent local self-government, belong there to the past. The central power governs and regulates everything. It provides amusements; constructs roads, bridges, internal improvements; controls trade; inspects manufactures. The effects of this system are thus described: “Develop in the slightest degree a Frenchman’s mental faculties, and he flies to a town as surely as steel filings fly to a loadstone. From all parts of France men of great energy and resource struggle up, and fling themselves on the world of Paris. There they try to become great functionaries. Through every department of the eighty-four, men of less energy and resource struggle up to the provincial capital. All who have, or think they have, heads on their shoulders, struggle into town to fight for office which the government alone can confer. The whole energy and knowledge and resource of the land are barrelled up in the towns: all between towns is utter intellectual barrenness.” Such are the withering effects of a centralized despotism.<sup>3</sup> How

<sup>1</sup> *Post*, secs. 28, 29, and notes.

<sup>2</sup> Prof. Bryce’s *American Commonwealth*, 1888, vol. I. chaps. 48–51. See also the useful and valuable monographs on Local Government in the several States, in the Johns Hopkins University Studies.

<sup>3</sup> But under the laws of 1866, 1871, and 1884, the French municipalities have a large degree of independence. The *commune* movement of 1871 was the natural

result of a popular uprising against centralized power. But it went to the other extreme, and contemplated, *without a national compact*, a league of 36,000 independent *communes*. Their declared scheme was this: “France shall no longer be one and indivisible, empire or republic; she shall form a federation, not of small states or provinces, but of free cities, linked together *only* so far as shall be consistent with the most absolute decentralization and local

different with the decentralized system of government in the United States, where each local constituency chooses its own officers; each road-district, school-district, village, town, city, and county administers its own local affairs by the people and for the people.<sup>1</sup>

§ 11. To *civil territorial divisions*, erected into corporations full or *quasi*, with defined powers of local administration, and the extension of the right to vote for officers to all who are to be affected by their action, are due that familiarity with public affairs, that love of liberty, that regard for private rights and property, and that universal reverence for and obedience to law, which are characteristic of the best government in Europe,—Great Britain, and the best in America,—the United States.<sup>2</sup>

government." (*Journal Officiel de la Commune*, April, 1871.) But a scheme which made cities, and not the nation, practically the sovereign, is radically defective, and open to all the objections which M. Mazzini has so forcibly pointed out against it. (*Contemporary Review*, 1871; reprinted *Littell's Living Age*, July, 1871, p. 112.)

<sup>1</sup> *Barrett v. Brooks*, 21 Iowa, 144, 151. By constitutional provision in New York, "it belongs exclusively to the local power to fill the offices, either by election or appointment, as the legislature may direct." *Met. Bd. Health v. Heister*, 37 N. Y. 661, 667; *People v. McDonald*, 69 N. Y. 362 (1877); *People v. Supervisors*, 112 N. Y. 585 (1889); *People v. Lynch*, 51 Cal. 15 (1875); s. c. 21 Am. Rep. 677. Opinion of *McKinstry, J.* See also Constitution of *Illinois*, art. ix. sec. 5; construed *People v. Chicago*, 51 Ill. 17 (1869); s. c. 2 Am. Rep. 278; Constitution of *California*, art. xi., entitled "Cities, Counties, and Towns," secs. 13, 15. Provisions exist in most, if not all, of the State constitutions, which place the right of local government, and to some extent the autonomy of municipalities, beyond the power of legislative destruction. Constitutional provisions as to qualification of electors and the right of equal representation held to apply to municipal corporations. *People v. Canaday*, 73 N. C. 198 (1875); s. c. 21 Am. Rep. 465.

Speaking of the power of creating debts and expending money by the city of Philadelphia, under the Consolidation Act of 1854, in a case where it was held that

this power had been vested in the legislative department, and not with subordinate officers, *Agnew, J.*, observed: "It is manifest that the city government is founded, in its leading thought, upon the American idea of a popular representative government, its immediate prototype being the form of the State government. The right of supervision and control is therefore vested in the councils as the immediate representatives of the popular will, which exerts and enforces its determining power by means of constantly recurring elections. Subject to this primary power the affairs of this people, great in numbers, wealth, intelligence, and influence, are conducted by departments and officers." *Philadelphia v. Flanigen*, 47 Pa. St. 21 (1864).

"What," inquired the Abbé Siéyès, in a book which gave a powerful impulse to the public mind at the beginning of the French Revolution of 1789,—"What is the *tiers état*?" And he answered, "Nothing." What ought it to be? "Everything." Thiers, *French Rev.*, vol. I. p. 27; Guizot, *Hist. Civ. Lect. VII.* On this popular foundation rests not only our national government, but as well all of our State governments and municipal institutions. *People v. Detroit*, 28 Mich. 223; s. c. 15 Am. Rep. 202 (1873). *Post*, secs. 58, 72, 73.

<sup>2</sup> After alluding to the antiquity of this system in England, Mr. Justice *Brown*, in the important case of the *People v. Draper* (15 N. Y. 532, 562), says: "Wherever the Anglo-Saxon race have gone,

But the picture is not without its shadows. The usefulness of our municipal corporations has been impaired by evils that are either inherent in them or that have generally accompanied their workings. Some of these may be briefly indicated: 1. Men the *best fitted* by their intelligence, business experience, capacity, and moral character, for local governors or counsellors are not always, it is feared,—it might be added, are not generally,—chosen. This is especially true of populous cities. 2. Those chosen are too apt to merge their *individual consciences* in their corporate capacity. Under the shield of their corporate character, men but too often do acts which they would never do as individuals. The public, as if

wherever they have carried their language and laws, these communities, each *with a local administration* of its own selection, have gone with them. It is here that they have acquired the habits of subordination and obedience to the laws, of patient endurance, resolute purpose, and knowledge of civil government, which distinguish them from every other people. Here have been the seats of modern civilization, the nurseries of public spirit, and the centres of constitutional liberty. They are the opposites of those systems which collect all power at a common centre, to be wielded by a common will and to effect a given purpose, which absorb all political authority, exercise all its functions, distribute all its patronage, repress the public activity, stifle the public voice, and crush out the public liberty."

"Whoever," says *De Tocqueville, Œuvres Complètes*, VIII., "travels in the United States is involuntarily and instinctively so impressed with the fact that the spirit of liberty and the taste for it have pervaded all the habits of the American people, that he cannot conceive of them under any but a Republican government. In the same way it is impossible to think of the English as living under any but a free government." After quoting these words, Prof. *Dicey*, in his work on the Law of the Constitution, says (2d ed., 1886, p. 173) that "they point in the clearest manner to the *rule, predominance, or supremacy of law* as the distinguishing characteristic of English institutions"; institutions which we have fully inherited or adopted. What is meant by absolute supremacy of the rule of law in England and America,

how it permeates the whole political system, and how it protects and secures the individual man in all of his fundamental legal rights, viz., that no man shall be punished except for a breach of law, and that all classes are subject to the ordinary law of the land administered in the ordinary law courts, with no immunity from liability of any officer or official however high (the King only excepted) who violates the legal rights of any other man, however humble, are so clearly set forth in the instructive work just cited, that it gives us pleasure to commend it to our readers.

"The city corporations," remarks a modern jurist, "which have grown up in modern times, are of infinite advantage to society; they bind men more closely together than does any other form of political association. But that which most remarkably distinguishes them from the close corporations which formerly existed, is the general spirit of freedom which has been breathed into them. More especially is this the case with town corporations in America, which are as different from those of England as the latter are from similar corporations in Scotland and Holland." Per *Grimké, J.*, *Rosebaugh v. Saffin*, 10 Ohio, 31, 37; see also *State v. Noyes*, 10 Fost. (N. H.) 292; and the opinion of *Allen, J.*, in *People v. Albertson*, 55 N. Y. 50, 57 (1873), where he says: "The right of (local) self-government lies at the foundation of our institutions." *People v. Supervisors*, 112 N. Y. 535. *Post*, secs. 45, note, 58, 72, 73, 183; *People v. Detroit*, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202.

to retaliate, acts *towards* corporations in the same spirit. The notion, though not avowed, is quite too much acted upon, that all that can be obtained from a public, or, indeed, from any corporation, is legitimate spoil. Against these, men, usually honest and fair in their dealings, do not scruple to make demands which they would never make against an individual.<sup>1</sup> 3. As a result, the administration of the affairs of our municipal corporations is too often *unwise and extravagant*.

§ 12. Municipal corporations are *institutions designed for the local government of towns and cities*; or, more accurately, towns and cities, with their inhabitants, are, for purposes of subordinate local administration, invested with a corporate character. To clothe them with powers to accomplish purposes which can better be left to private enterprise, is unwise. Their chief function should be to regulate and govern in respect of local affairs, which can be dealt with better by the people concerned than by the distant central power. To invest them with the powers of individuals or of private corporations, for objects not pertaining to municipal rule, is to pervert the institution from its legitimate ends, and to require of it duties which it is not adapted satisfactorily to execute. Some of the evil effects of municipal rule have arisen from legislation unwisely conferring upon municipalities, at the suggestion often of interested individuals or corporations, powers foreign to the nature of these institutions, and not necessary to enable them to discharge the appropriate functions and duties of local administration. Among the most conspicuous instances of such legislation may be mentioned the power to aid in the building of railways, to incur debts, often without any limit or any which is effectual, and to issue negotiable securities.<sup>2</sup> The result has too often been that debts are incurred so large that they press with disastrous weight on the municipality and its citizens. Extraordinary and extra-municipal powers have been too often incautiously or unwisely granted, and the charters or constituent acts carelessly worded and loosely construed. The remedy suggested by experience consists, in part, in constitutional provisions prohibiting the granting of special charters, and requiring all municipal corporations to be

<sup>1</sup> These effects are not confined to this side of the Atlantic. "It is a familiar fact," says Mr. Herbert Spencer, "that the corporate conscience is ever inferior to the individual conscience—that a body of men will commit, as a joint act, that which every individual of them would

shrink from, did he feel personally responsible." Essays, No. VII. p. 261, Am. ed. 1865; and see *Ib.*, Essays No. 5, for a description—perhaps too highly colored—of the unsatisfactory working of the English reformed municipal corporations.

<sup>2</sup> See *post*, secs. 117, 153.

organized under general laws. The legislature ought also to be prohibited from allowing municipal corporations to engage in extra-municipal projects, or to incur debts or levy taxes for such purposes. The powers granted to such corporations, and especially the power to levy taxes, ought to be more carefully defined and limited, and should embrace such objects only as are necessary for the health, welfare, safety, and convenience of the inhabitants.<sup>1</sup> The amount of indebtedness that may be incurred, even for municipal purposes, ought also to be limited beyond the power to be evaded.<sup>2</sup>

§ 12 a. Unrestrained power in the central legislative authority to bestow valuable franchises affecting cities and property therein, without the consent of the municipal authorities and of the property owners who are injuriously affected, necessarily makes the city and such owners the sufferers from inconsiderate grants. Administered on business principles, a city ought to derive large revenues from the use of wharves, from railways occupying streets with their tracks, from gas, water, and other companies to which are given the right to lay mains in the streets and public places. Effective

<sup>1</sup> "The great increase of corruptions in municipal bodies, growing out of the ability to create by taxation a fund which may be squandered, has made many thinking men doubt the wisdom of endowing them with the power." Mr. Justice Miller, in *Rusch v. Des Moines County*, 1 Woolw. C. C. 313, 322 (1868). And note the striking observations of Mr. Justice Agnew on the abuses which attend the administration of finances by municipal bodies and officers, and the too prevalent frauds in the procurement and execution of public contracts. *Philadelphia v. Flaming*, 47 Pa. St. 21; *Hague v. Philadelphia*, 48 Id. 527. In the Pennsylvania case first cited, the suggestion of the text as to the wisdom of strictly guarding and limiting the power to create debts is well enforced by this learned judge. He truly says: "A valid contract is uncontrollable, demanding its performance at the hands of the judiciary, and calling to their aid the whole power of the government. If an appropriation for its payment is not made this year, it must be in the next or some following." *Agnew, J.*, 47 Pa. St. 21. The gigantic and astounding frauds and corruption perpetrated by what is known as the "Tweed ring," which were

revealed in 1871, in the local administration of the affairs of the great city of New York, have awakened public attention to the necessity of more efficient checks upon the misuse of municipal powers. The legislation which was thereupon enacted to prevent frauds in the future, cannot be said, in view of disclosures in 1886 in reference to the Broadway railway franchises, to have been adequate to the end proposed. It was judicially established that a large majority of the board of aldermen had been guilty of accepting bribes. *People v. Jaehne*, 103 N. Y. 132; *People v. O'Brien*, 111 N. Y. 1 (1888). Legislation based upon the principles suggested in the text (secs. 13-15) would, it is believed, have prevented these shocking and scandalous corruptions. The mayor was without real power in the matter of the granting of these franchises by the common council. His veto was overridden.

<sup>2</sup> As we shall hereafter see, nearly all of the States which have revised or adopted Constitutions since the above was written, have ordained provisions limiting the power of the State legislatures and of municipalities in respect of each of the four important subjects referred to in the text.

organic limitations on the power both of the legislature and of the local authorities to make grants of this character ought to be devised, and the proprietary rights of adjoining property owners protected. Accordingly in late years several States have ordained constitutional provisions of this character.<sup>1</sup> And generally it may be said that experience has shown the necessity of organic provisions more exactly defining and limiting the power of the legislature to enact laws which affect the local and private or distinctly corporate rights of chartered cities, and which involve expenditures of money, the creation of debts and consequent pecuniary burdens, without the consent, or against the will of the local authorities of the municipality or the people thereof.<sup>2</sup>

§ 13. Experience with us has also demonstrated *the necessity of more power and more responsibility in the executive head* of our municipal institutions. Too often the duties of the mayor or executive officer are only nominal, and to these he gives but little attention, — a natural result of his want of importance, and of his inability to control the administration of municipal affairs. If the office were clothed with dignity and real authority; if the mayor were invested with the veto power, if he had the sole right to appoint and the unrestricted power to suspend or remove subordinate officials or heads of departments, then the citizens could justly demand of him that he should be individually responsible for the proper conduct of the concerns of the municipality, and if griev-

<sup>1</sup> By the amended Constitution of New York, which took effect January 1, 1875, it is provided (art. 3, sec. 18) that "the legislature shall *not pass any private or local bill* granting to any corporation, association, or individual a right to lay down railroad tracks, or any exclusive privilege, immunity, or franchise whatever. The legislature shall pass *general laws* providing for the cases enumerated in this section, and for all other cases which, in its judgment, may be provided for by general laws; but no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of that portion of the street or highway upon which it is proposed to construct and operate such railroad, be first obtained." Several other States have simi-

larly amended their constitutions. *Post*, chap. xviii., on Streets.

The legitimate sources of revenue that may be thus opened to cities is well illustrated by the case of the city of Berlin. In that city, it is stated on good authority that the street railway company not only paves a portion of all the streets it occupies, but pays a percentage of its receipts to the city; whose revenue from this source is about \$250,000 a year; and in 1911 the street railway, with all of its equipment, will become the property of the city. Municipal gas-works yield about 18 per cent of the entire annual expenditure of the city as profit; the water-works also yield an annual profit of about \$220,000; and even the great sewerage system produces something like a net revenue of the same figure through the annual rates imposed upon householders for the use of sewers.

<sup>2</sup> Mr. Low, describing his experience as

ances exist, they would know to whom to apply for remedy, or upon whom to fix the blame.<sup>1</sup>

§ 14. Municipal corporations, as they exist in this country, it may be further observed, are of *exceedingly complex character*. Not here to allude to the legal complexity which inheres in their *corporate* nature, we may mention that which arises from the exceedingly diverse character of the multiform duties which are confided to their agency and management, requiring the delegation of corresponding powers and provisions for their execution.

mayor of Brooklyn (1 Bryce, Amer. Commonwealth, chap. lii.), says: "The habit of interference in the details of city action has become to the legislature almost a second nature. In every year of his term [as mayor] the writer was compelled to oppose at Albany unwise and adverse legislation on the part of the State. No law objected to by the mayor during this interval was placed upon the statute book. It is not too much to say, however, that the greatest anxieties of his term sprang from the uncertainties and difficulties of this annual contest, on the one hand to advance the interest of the city, and on the other to save it from harm in its relations to the law-making power of the State."

<sup>1</sup> Extended observation of the workings of our municipal institutions has satisfied the author that the views expressed in the text are sound, and he is glad to find them confirmed by the Hon. Josiah Quincy, in his *Municipal History of Boston*, published in 1852. Mr. Quincy was mayor of the city of Boston from 1823 to 1828, inclusive, and his opinions are entitled to great respect, not only from his known ability, but large experience in municipal affairs. It is interesting to observe the striking coincidence of his views with the recommendations of the "Committee of Seventy," of New York, respecting municipal administration and the importance of efficient executive superintendence, control, and responsibility. *Municipal History of Boston*, chap. v. And to the same effect is Mr. Charles Nordhoff's interesting article in the *North American Review* for October, 1871, entitled "The Misgovernment of New York,—A Remedy Suggested." This vigorous writer sketches the defects in the ordinary mu-

nicipal charters with a masterly hand, and shows great familiarity with the subject of which he treats. Many of his suggestions may be profitably studied by the legislator. It may be observed that in England, under the reformed municipal system, the right to a voice in municipal management is not universal, but is restricted to occupiers of houses and taxpayers, and yet we have, as we have seen, complaints of municipal extravagance, corruption, and abuse. In the existing system of municipal government in Great Britain, the function of the mayor, as we shall point out in a subsequent chapter, is in many respects essentially different from the function of the corresponding officer in our American municipalities. There the actual work of municipal administration is in effect carried on by the councils and committees, upon whom, rather than upon the mayor, rests the responsibility of the success of municipal rule. *Political Science Quarterly*, vol. iv., 215 *et seq.*

The charter of the city of Brooklyn which went into effect January 1, 1882, and which has been declared by the highest authority to be such a "vast improvement" on any system of government which the city had tried before, "that no voice is raised against it," is based in its reform features essentially upon the principles suggested in the text. See on this subject chap. lii. vol. I. Bryce's *American Commonwealth*, written by the Hon. Seth Low (the first mayor of Brooklyn under this charter), entitled "An American View of Municipal Government in the United States." It is replete with that wisdom and instruction that come, and can only come, from careful study combined with practical experience.



Some of these powers are civil or political, and not peculiar to the people of the municipality; others are purely local, of which some concern all the inhabitants, and some affect only, or mainly, the property owners, on whom exclusively or largely the burden of their exercise or administration falls. In the ordinary municipal charters, the essential differences between these powers have not been sufficiently regarded, and in consequence *adequate* checks upon their abuse have not been provided.

§ 15. The *general right of suffrage* will remain, and in the author's judgment, ought, at least, as respects the popular branch of the municipal council, to remain as extensive in the municipality as in the state; and all schemes of municipal reform, whatever their merit, based upon restricting it within narrower limits than those here suggested, are simply impracticable.<sup>1</sup> But if special or extra-municipal powers be granted, not affecting civil, political, or other rights which concern all, but which involve directly the expenditure and payment of money, it is but just that the project should be required to have the support of a majority in value of

<sup>1</sup> The observations upon this subject of Mr. Seth Low in his chapter in Bryce's work, before referred to, are sound and weighty. We extract one or two sentences: "Every one understands that universal suffrage has its drawbacks, and in cities these defects become especially evident. . . As it exists in the United States, it is not only a great element of safety, but is perhaps the mightiest educational force to which the masses of men have ever been exposed. In a country where wealth has no hereditary sense of obligation to its neighbors, it is hard to conceive what would be the condition of society if universal suffrage did not compel every one having property to consider, to some extent at least, the well-being of the whole community." 1 Bryce, *Am. Com.*, 634, 635.

Mr. Bright gave eloquent expression to similar sentiments in the peroration of his speech in the House of Commons, March 24, 1859, on Lord Derby's Reform Bill: "I have endeavored to stand on the rules of political economy, and to be guided by the higher rules of true morality; and when advocating a measure of reform larger than some are prepared to grant, I appear in that character, for I believe that a sub-

stantial measure of reform would elevate and strengthen the character of our population; that, in the language of the beautiful prayer read here every day, it would tend 'to knit together the hearts of all persons and estates within this realm.' I believe it would add to the authority of the decisions of Parliament, and I feel satisfied it would confer a lustre, which time could never dim, on that benignant reign under which we have the happiness to live." And later, in 1865, he exclaimed to a Birmingham audience: "Who is there that will meet me on this platform, or will stand upon any platform, and will dare to say, in the hearing of an open meeting of his countrymen, that these millions for whom I am now pleading are too degraded, too vicious, and too destructive to be entrusted with the elective franchise? I, at least, will never thus slander my countrymen. I claim for them the right of admission, through their representatives, into the most ancient and the most venerable Parliament which at this hour exists among men; and when they are thus admitted, and not till then, it may be truly said that England, the august mother of free nations, herself is free."

those who must pay the expense. No small proportion of corruption and abuse in municipalities has had its source in their authority to make public and local improvements. The power is usually conferred without sufficient care, and the rights of the property owners (often made liable for the whole cost of the improvement or amount of the expenditure) are not sufficiently respected and guarded. In many of its more important aspects a modern American city is not so much a miniature State as it is a business corporation, — its business being wisely to administer the local affairs and economically to expend the revenues of the incorporated community. As we learn this lesson and apply business methods to the scheme of municipal government and to the conduct of municipal affairs, we are on the right road to better and more satisfactory results.<sup>1</sup>

§ 16. As it is the part of wisdom to *organize municipal corporations under general laws* so that defects and abuses, being generally seen and felt, will be the more speedily and better remedied by the legislature, so municipal corporations should be shorn of the power to grant special privileges, except under ordinances general in their character, and which, on equal or fair terms, will make them available to all. The courts, too, have duties, the most important of which is to require these corporations, in all cases, to show a plain and clear legislative grant for the authority they assume to exercise; *to lean against constructive powers*, and, with firm hands, to hold them and their officers within chartered limits. As a rule this duty has, in our judgment, been faithfully performed.

§ 17. If we *analyze the complex powers usually conferred upon a municipality* in this country we shall discover that these are of two general classes, viz., 1. Those which relate to health, good government, efficient police, &c., in which all the inhabitants have an equal interest and ought to have an equal voice. 2. Those which directly involve the expenditure of money, and especially those relating to local improvements the expense of which ultimately falls upon the property owners. As respects these, the controlling voice ought to be with those who have to bear the burden. No municipal management, will, in the long run, be other than extravagant and unwise where the members of the governing body have no substantial interests in the municipality, and where they have more to gain by plundering than by protecting it. To insure good government there must be a real identity of interest between the

<sup>1</sup> 1 Bryce, Am. Com., chap. lii. p. 625. *Ante*, sec. 12 a and note.

members of the governing body and the municipality. The problem of satisfactory municipal rule in populous cities is one which is urgently demanding solution, but it is also one which, it is feared, must be slowly wrought out by experience. It is estimated that the indebtedness of the public and municipal corporations in this country already exceeds \$1,000,000,000; much of it was created without the sanction of those who will have to pay it, and it is in many places, especially in the newer States, pressing with heavy weight upon the burdened taxpayer. A remedy is imperatively demanded, and suggestions herein made have been offered in the hope that some of them may not be wholly undeserving of attention.

But with all the drawbacks we have mentioned (many of which are remediable) our system of popular municipal organization and local administration is, beyond controversy, the fairest to the individual citizen, and, on the whole, the most satisfactory in its operations and results, of any that have yet been devised. Any other conclusion would be equivalent to admitting that the people are incapable of enlightened self-government; that holders of property ought alone to be respected, and alone to be invested with political and municipal rights; that the few ought to govern the many; and that our representative system, the flower of modern civilization, based upon the equal right of every man to a voice in the local and general government, is a failure. That it is a failure we cannot admit. That it is not a failure is demonstrated by the experience of more than two centuries. It is not improbable that we sometimes overestimate the shortcomings, chiefly felt in the larger cities, in the practical workings of our municipal system, for the system is an open one, in which all are interested to bring its abuses into the light of day. The fine observation of Lord Bacon fitly applies: "*The best governments are always subject to be like the fairest crystals, wherein every icicle or grain is seen, which in a fouler stone is never perceived.*"<sup>1</sup>

<sup>1</sup> It is frequently said that New York is among the worst governed of cities. The complexity and magnitude of its municipal functions necessarily present great difficulties in the way of thorough and efficient administration. Abuses are difficult entirely to suppress. The city has charge of charities and corrections, a law department, a department of public parks, of public works, of health, of police, of street cleaning, of fire, of education. Appropriations for these purposes for the year 1889 amounted to nearly twenty millions of dollars. The aggregate appropriations for the several departments

of the city of New York for 1888 and 1889 will appear from the following table:—

Finance Department . . . . .	1888.	1889.
Law Department . . . . .	\$276,000 00	\$287,000 00
Public Works . . . . .	250,544 00	216,544 00
Public Parks . . . . .	3,180,309 00	3,124,221 00
Charities and Corrections . . . . .	1,014,650 00	1,212,200 00
Health Department . . . . .	2,343,372 00	2,197,050 00
Police . . . . .	394,277 00	413,300 00
Street cleaning . . . . .	4,415,255 66	4,409,550 94
Fire . . . . .	1,269,459 00	1,272,040 54
Taxes and assessments . . . . .	1,976,492 00	2,188,043 00
Education . . . . .	112,000 00	117,200 00
	4,808,167 00	4,079,008 86
	<u>\$19,625,525 66</u>	<u>\$19,464,158 84</u>

To enable it to pay interest on its public debt and for other purposes twelve or thirteen millions more is required ; so that at this time the annual operations of the city government require to be raised by taxation between thirty-three and thirty-four millions of dollars, necessitating a tax rate of somewhat over two per cent on the assessed values of taxable property. The official statement of the retiring mayor, Honorable Abram S. Hewitt, made the 31st of December, 1888, at the end of his term of two years, shows the condition of the city government to be much better than is commonly supposed. He says : " Every department of the city government is in admirable working order. No private business is better organized or more closely attended to than the public service in this city. Every outstanding claim that could be collected has been ; all disputes have been adjusted ; the public property has been carefully conserved

and made productive, and there are no claims against the city of any considerable magnitude. The credit of the city, as indicated by the prices bid for its bonds, has never been so high as at the present time. Its securities command a higher price than those of any other city in the world. At the outset of my term of office I adopted the principle of calling together the heads of departments to consult as to legislation which might be required for the advantage of the city and the better conduct of its business. Every act proposed was carefully considered by this conference. One hundred and ninety-one bills directly affecting the city of New York were passed by the legislature during the last year. The passage of many objectionable bills was thus defeated, but in some important cases the legislature acted directly against the recommendations of the city authorities."

## CHAPTER II.

CORPORATIONS DEFINED AND CLASSIFIED. — PRIVATE, PUBLIC, AND MUNICIPAL CORPORATIONS DISTINGUISHED. — THE NEW ENGLAND TOWN.

§ 18 (9a). **Corporation defined.** — *A corporation is a legal institution, devised to confer upon the individuals of which it is composed powers, privileges, and immunities which they would not otherwise possess, the most important of which are continuous legal identity or unity, and perpetual or indefinite succession under the corporate name, notwithstanding successive changes, by death or otherwise, in the corporators or members. It conveys, perhaps, as intelligible an idea as can be given by a brief definition to say that a corporation is a legal person, perfectly distinct from the members which compose it, having a special name, and having such powers, and such only, as the law prescribes. The most accurate notions of complex subjects come not from definition, but description; and in the course of the present work we shall describe the class of corporations with which it deals, by their creation, constitution, faculties, powers, objects, duties, and liabilities. Some of the definitions and deductions in the earlier reports amuse by their quaintness, but are without much practical value. "As touching corporations," says Lord Coke, "the opinion of Manwood, chief baron, was this: that they were invisible, immortal, having no conscience or soul; and therefore, no subpœna lieth against them; they cannot speak, nor appear in person, but by attorney."*<sup>1</sup>

Chief-Justice Marshall's *description of a corporation* is remarkable for its general accuracy and felicitous expression: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed to be best calculated to effect the object for which it is created. Among the most important are *immortality* [in the legal sense that it may be made *capable* of indefinite duration], and, if the expression may be allowed, *individuality*, — properties by which a perpetual succession of many persons are considered

<sup>1</sup> 2 Bulst. 233; Willc. Corp. 15. *Ante*, sec. 3.

as the same, and may act as a single, individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacy, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being."<sup>1</sup> Thus, though the members change, the corporation itself remains in its legal personality and unity the same, all of its members, past and present, constituting in law but one person, in the same manner as the Thames or the Mississippi is still the same river, though the parts composing it are constantly changing.<sup>2</sup> The above observations are, in general, applicable to all corporations, private as well as public and municipal.

§ 19 (9b). **Municipal Corporations defined.** — A *municipal corporation*, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the general character above described, established by law partly as an agency of the State to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated.<sup>3</sup>

<sup>1</sup> Dartmouth College v. Woodward, 4 Wheat. 636, 1819. Other definitions: 4 Black. Com. 37; 1 Kyd, Corp. 13; Grant, Corp. 3, 4; Angell & Ames, Corp. sec. 1; Glover, Corp. 3, 6. Willcock declines to define, but describes corporations. Munic. Corp. 15. The last-named author observes that "a corporation continues the same body politic from its creation to its dissolution, unaltered by the revolution of ages or the successive changes of its members, so that it is unnecessary to make grants to them and their successors, or to declare their obligations binding on their successors." *Ib.* 16; Glover, 8; Grant, 5; 7 Vin. Abr. 358, 363. *Ante*, sec. 3.

<sup>2</sup> Glover, 8; 1 Black. Com. 468. It is scarcely ever quite safe to express or even to illustrate a legal proposition in figura-

tive language, but the simile of the elegant English commentator is not only striking, but accurate. "All of the individual members," present and future, "are but one person in law, — a person that never dies, in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant." 1 Black. Com. 468.

<sup>3</sup> "A body politic," says Lord Coke, "is a body to take in succession, framed as to its capacity by policy, and therefore is called by Littleton (sec. 413) a *body politic*; it is called a *corporation*, or *body corporate*, because the persons are made into a body, and are of capacity to take, grant, &c., by a particular name." Vinier, Abr. Corp. (a 2). A *municipal corporation* is also defined to be "An investing the people of a place with the local govern-

§ 20. **Same subject.** — *We may, therefore, define a municipal corporation* in its historical and strict sense to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper.<sup>1</sup> The phrase "municipal corporation" is used with us in general in the strict and proper sense just mentioned; but sometimes it is used in a broader sense that includes also public or *quasi* corporations, the principal purpose of whose creation is as an instrumentality of the State, and not for the regulation of the local and special affairs of a compact community.<sup>2</sup>

ment thereof." Salk. 183. "This latter description," says Mr. Justice *Nelson*, in the *People v. Morris*, 13 Wend. 325, 334 (1835) "is the most appropriate, and is justified by the history of these institutions, and the nature of the powers with which they were, and are, invested." It is also quoted by *Campbell*, C. J., in the *People v. Hurlburt*, 24 Mich. 44 (1871). *Post*, sec. 183. The *English Municipal Corporations Act* 1882 applies to certain described incorporated towns, cities, and places; and it clearly defines the words "municipal corporations" as used in the Act, thus: "Municipal corporation means the body corporate constituted by the incorporation of the inhabitants of a borough" (sec. 7). "The municipal corporation acts by its council, which shall exercise all the powers vested in the corporation. The council consists of the mayor, aldermen, and councillors." (sec. 10.)

<sup>1</sup> 2 Bouv. Law Dict. 21; 2 Kent, 275; *People v. Morris*, *supra*. *Ante*, secs. 9, 12, 14, 17, 19; *post*, secs. 21, 22, 23, 46, 58.

<sup>2</sup> *Heller v. Stremmel*, 52 Mo. 309 (1873); *State v. Leffingwell*, 54 Mo. 458, 471, (1873). This last case discusses the meaning of the terms "municipal corporations" and "corporations for municipal purposes," as used in the Constitution of the State. *Post*, sec. 49. "The definition of a municipal corporation," says the Supreme Court of *Missouri*, "would only include organized cities and towns and other like organizations with political and

legislative powers for the local civil government and police regulation of the inhabitants of particular districts included in the boundaries of the corporation;" and it was accordingly held that an *incorporated board of public schools was not a municipal corporation* within the meaning of an Act declaring that no person shall be eligible to a certain office who shall hold any office under a municipal corporation. *Heller v. Stremmel*, *supra*. In *Wisconsin* the term "municipal corporation," as used in the Constitution of the State, does not include towns (*Norton v. Peck*, 3 Wis. 714); and when used in *Statutes* it is presumed to be used in the sense in which the term is used in the Constitution, unless a different legislative intention appears; and under the legislation of that State municipal corporations, properly and strictly so called, do not include towns not chartered, school districts, or other *quasi* corporations. *Eaton v. Manitowoc Co.* (power to purchase and hold tax certificates), 44 Wis. 489 (1878). *Post*, sec. 48, note. "The word 'municipal,' as originally used in its strictness, applied to cities only. The word now has (in the legislation of *Iowa*) a much more extended meaning, and when applied to corporations, the words 'political,' 'municipal,' and 'public' are used interchangeably." *Rothrock, J.*, in *Curry v. District Township of Sioux City*, 62 Iowa, 102, construing a special act. *Post*, sec. 22, n. In the legislation of *Illinois*

§ 21. **Creation and Powers.**—Like other corporations, municipal corporations must with us *be created by statute*. They possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them or by other statutes applicable to them. Persons residing in or inhabiting a place to be incorporated, as well as the place itself, are—both *the persons and the place*—indispensable to the constitution of a municipal corporation.<sup>1</sup> *Artificial succession* also is of the essence of such a corporation. Municipal corporations are created and exist for the public advantage, and not for the benefit of their officers or of particular individuals or classes. *The corporation is the artificial body created by the law*, and not the officers, since these are, from the lowest up to the councilmen or mayor, the mere ministers of the corporation. Even the council, or other legislative or governing body, constitutes, as it has been well remarked, neither *the corporation*, nor in themselves *a corporation*.<sup>2</sup> It is quite impossible in any brief space to convey an adequate idea of the exact nature and properties of an American municipal corporation. There is nothing in the law more complex and abstruse. Although the inhabitants of a place be incorporated, they do not constitute the corporation; neither, as we have just observed, is it constituted by the governing body. Notwithstanding Mr. Kyd's criticism, the corporation is *invisible*, for, although we may see all the inhabitants, or all of the officers, we do not see the legal body—ideal person,—which makes the corporation, as we see an army; but this is a property common to all corporations.<sup>3</sup> An additional complexity in municipal corporations arises out of the various and diverse powers usually conferred, giving them, as they exist among us, an extremely composite character. The primary and fundamental idea of a municipal corporation is an institution to regulate and administer the internal concerns of the inhabitants of a defined locality in matters peculiar to the place incorporated, or at all events not common to the state or people at large; but it is the constant practice of the States in this country to make use of the incorporated instrumentality, or of its officers, to exercise powers, perform duties, and execute functions

an incorporated "town" and an incorporated "village" are one and the same thing. *Enfield v. Jordan*, 119 U. S. 680; *Martin v. People*, 87 Ill. 524. Mr. Justice Bradley, in *Enfield v. Martin*, *supra*, at page 685, considers the meaning of the words "town" and "village" as used in New England, New York, the Southern, the Middle, and the Western States.

<sup>1</sup> *Galesburg v. Hawkinson*, 75 Ill. 156 (1874). *Post*, sec. 183.

<sup>2</sup> *Reg. v. Paramore*, 10 Ad. & El. 286; *Reg. v. York*, 2 Q. B. 850; *Grant*, 357; *Glover*, 4; *Harrison v. Williams*, 3 Barn. & Cress. 162; *Brown v. Gates*, 15 W. Va. (citing text) 131. *Post*, sec. 40.

<sup>3</sup> *Ante*, sec. 3.



that are not strictly or properly local or municipal in their nature, but which are, in fact, state powers, exercised by local officers, within defined territorial limits; and it is important, as we shall hereafter see, to keep this distinction in mind. In theory, the two classes of powers are distinct; but the line which separates the one from the other is often difficult to trace. The point may be illustrated from the English law: If the king incorporate a town, its officers will have no implied power as conservators or justices of the peace,—express words are necessary to confer this power; and when they act in the latter capacity, it is not because they are corporate officers, but because of powers expressly annexed to their corporate offices; and the two capacities remain distinct, although united in the same person.<sup>1</sup> The subject itself will be elsewhere discussed. The *name* of the municipal corporation, its *boundaries*, its *officers*, its *powers*, its *duties*, and the like, are subjects regulated by legislative enactment, and will be hereafter noticed.

§ 22 (10). **Public and Municipal Corporations distinguished.**—Corporations intended to assist in the conduct of local civil government are sometimes styled *political*, sometimes *public*, sometimes *civil*, and sometimes *municipal*, and certain kinds of them with very restricted powers, *quasi* corporations,—all these by way of distinction from *private* corporations. All corporations intended as agencies in the administration of civil government are *public*, as distinguished from *private* corporations. Thus an incorporated school-district, or county, as well as city, is a public corporation; but the school-district or county, properly speaking, is not, while the city is a *municipal* corporation.<sup>2</sup> All municipal corporations are public bodies, created for civil or political purposes; but all civil, political, or

<sup>1</sup> 1 Kyd, 327; *People v. Hurlburt*, 24 Mich. 44 (1871), *per Campbell*, C. J.; s. c. 6 Am. Law Rev. 376; s. c. 9 Am. Rep. 103; s. p. *People v. Detroit*, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202 (*post*, secs. 72, 73), in which the nature of municipal corporations and the purposes of their creation are fully discussed by Cooley, J. The text quoted and the distinction approved, and made the basis of the decision, in *Beach v. Leahy*, 11 Kansas, 23, 30 (1873).

<sup>2</sup> *Ante*, secs. 9, 12, 14, 17, 19, 20, and note. *White v. Commissioners*, 90 N. C. 437; *Schultes v. Eberly*, 82 Ala. 242. In *Arkansas*, school-districts are by statute *quasi* corporations, with power to sue and

be sued, but not liable for trespasses committed by their officers. *School District v. Williams*, 38 Ark. 454. In *Iowa* a *school district* is a municipal corporation within the meaning of the act authorizing the issue of bonds by such corporations. *Curry v. District Township of Sioux City*, 63 Iowa, 102. In *Louisiana* the *police juries* of the several parishes are municipal corporations. *Police Jury of Ouachita v. Monroe*, 38 La. An. 630. "Municipal corporations," as used in the amendment to the Constitution of *Minnesota* relating to the assessment of property for local improvements, held to include *counties*. *Dowlan v. County of Sibley*, 36 Minn. 430. *Supra*, sec. 20, and note.

public corporations are not, in the proper use of language, municipal corporations. The phrase "municipal corporations," in the contemplation of this treatise, has reference to *incorporated villages, towns, and cities*, with power of local administration, as distinguished from other public corporations, such as counties and *quasi corporations*.<sup>1</sup>

§ 23. **Same subject.** — The *distinction between municipal corporations proper*, such as chartered towns and cities, or towns and cities voluntarily organized under general incorporating acts, such as exist in a number of the States, and *involuntary quasi corporations*, such as counties, has been very clearly drawn by the Supreme Court of Ohio: "*Municipal corporations proper* are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience." On the other hand, "*Counties* are at most but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the State, created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) organization is asked for, or at least assented to, by the people it embraces; the latter organization (counties) is superimposed by a sovereign and paramount authority."<sup>2</sup> "A *municipal corporation proper* is created mainly for the interest, advantage, and convenience of the locality and its people ;<sup>3</sup> a *county organization* is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general ad-

<sup>1</sup> Hamilton Co. v. Mighels, 7 Ohio St. 109 (1857) ; Finch v. Board, &c., 30 Ohio St. 37 ; Askew v. Hale, 54 Ala. 639, — approving text ; Greene County v. Eubanks, 80 Ala. 204 ; Lawrence County v. Chat- teroi R. R. Co., 81 Ky. 225 ; Manuel v. Commissioners, 98 N. C. 9 ; Cathcart v. Comstock, 56 Wis. 590.

<sup>2</sup> Hamilton Co. v. Mighels, *supra*. A county is one of the public territorial divisions of a State, created and organized for public political purposes connected with the administration of the State government, and specially charged with the superintendence and administration of the

local affairs of the community; and, being in its nature and objects a municipal organization, the legislature may, unless restrained by the Constitution, or some one of those fundamental maxims of right and justice with respect to which all governments and society are supposed to be organized, exercise control over the county agencies, and require such public duties and functions to be performed by them as fall within the general scope and objects of the municipal organization. Talbot v. Queen Anne's County, 50 Md. 245. *Post*, chaps. iv., xxiii.

<sup>3</sup> *Post*, sec. 183. *Ante*, secs. 19-22.

ministration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the general administration of that policy."<sup>1</sup>

§ 24. *Same subject.* — An incorporated city or town sometimes embraces by legislative provision *two distinct corporations*, as for example, the municipal and the school corporation existing within the same territory. It is in such cases a distinct corporation for school purposes, and under the statute or charter may be bound as such for the contract price of materials furnished and labor performed by another in the erection of a school building for such corporation.<sup>2</sup> More generally, however, *school-districts* are organized under the general laws of the State, and fall within the class of corporations known as *quasi corporations*.<sup>3</sup>

<sup>1</sup> *Hamilton Co. v. Mighels*, 7 Ohio St. 109. In this case, from which we have quoted, the learned judge, adverting to the case in hand, in which it was sought to make the county liable in damages to one who suffered a personal injury from the neglect of the commissioners of the county in the discharge of their official duties, says: "But, it is said, the members of the board of county commissioners are chosen by the electors of the county, and hence the board is to be regarded as the *agents of the county*, for whose torts in the performance of official duties the county ought to be responsible. True, the people of the county elect the board of county commissioners; but they also elect the sheriff and treasurer of the county. Are the people of the county, therefore, responsible for the malfeasances in office of the sheriff or for the official defalcations of the county treasurer? This will not be pretended. . . . We cannot but think that county commissioners are not agents or representatives of the county in any such sense or manner as to render the people of the county justly answerable for their neglect; even if the neglect be such as would create a civil liability against a natural person or a municipal or private corporation. It is," he adds, "undoubtedly competent for the legislature to make the people of a county liable for the official delinquencies of the county commissioners; but this has not yet been done, and

we think such liability cannot be derived from the relations of the parties, either on the principles or the precedents of the common law." Followed, *Jacobs v. Hamilton Co.*, 4 Fisher Pat. Cases, 81 (1862). Also cited and followed in *Wehn v. Gage Co.*, 5 Neb. 494 (1877), where it was held that, in the absence of a statute creating the liability, the county was not liable to an action by reason of its jail being so erected and kept as to become an actual nuisance to persons residing near it. Sec. 22, cited and approved. *Pulaski County v. Reeve*, 42 Ark. 55; *State v. Leffingwell*, 54 Mo. 453 (1873); *Askew v. Hale Co.*, 54 Ala. 639 (1875); s. c. 25 Am. Rep. 730. See also *Soper v. Henry Co.*, 26 Iowa, 264 (1868); *Treadwell v. Commissioners*, 11 Ohio St. 190; *Angell & Ames*, secs. 14, 23, 24, 25. *Post*, secs. 57, 66, also chapter on Actions, secs. 963, 965, 966, 1014.

<sup>2</sup> *Princeton v. Gebhart*, 61 Ind. 187; *Inglis v. Hughes*, 61 Ind. 212; *Wright v. Stockman*, 59 Ind. 65; *Sheffield v. Andrews*, 56 Ind. 157.

<sup>3</sup> *Harris v. School District*, 8 Foster, 28 (N. H.) 58, 61 (1853). Speaking of the powers of separate school-districts not included in a municipality, and of their officers, *Bell, J.*, in the case just cited, observes: "These little corporations have sprung into existence within a few years, and their corporate powers and those of their officers are to be settled by the constructions of the courts upon a succession of crude, unconnected, and often experi-

§ 25 (10 a). **Same subject. Distinction between Public and quasi and Municipal Corporations.** — Civil corporations are of different *grades or classes*, but in essence and nature they must all be regarded as public. The *school-district* or the *road-district* is usually invested by general enactments operating throughout the State with a corporate character, the better to perform within and for the locality its special function, which is indicated by its name. It is but an instrumentality of the State, and the State incorporates it that it may the more effectually discharge its appointed duty. So with *counties*. They are involuntary political or civil divisions of the State, created by general laws to aid in the administration of government. Their powers are not uniform in all the States, but these generally relate to the administration of justice, the support of the poor, the establishment and repair of highways, — all of which are matters of *State*, as distinguished from municipal concern. They are purely auxiliaries of the State; and to the general statutes of the State they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject.<sup>1</sup> Considered with respect to the limited number of their corporate powers, the bodies above named rank low down in the scale or grade of corporate existence; and hence have been frequently termed *quasi corporations*.<sup>2</sup> This designation distinguishes them on the one hand

mental enactments. School-districts are in New Hampshire *quasi* corporations of the most limited powers known to the laws. They have no powers derived from usage. They have the powers expressly granted to them, and such implied powers as are necessary to enable them to perform their duties, and no more. Among them is the power to vote money for specified purposes, and the power to appoint committees 'to carry their votes' relative to those purposes 'into effect.' The district may clearly, by their votes for building and repairing school-houses, limit the expense to a definite sum; and they may limit the precise repairs or the exact description of the school-house to be built, and when this is done the *committee* (appointed to 'carry the votes into effect') cannot bind the district by exceeding those limits. These committees are special agents, without any general powers over the affairs of the district, and their powers are confined to a special purpose; and no inference can be drawn from the general nature of their

powers. The liability of such powers to abuse furnishes the strongest arguments against their existence," as a committee might load the district with debts, though the district had expressly limited their authority. See also *Wilson v. School Dist.*, 32 (N. H.) 118 (1855); *Foster v. Lane*, 10 Foster, 30 (N. H.) 305, 315; *Giles v. School Dist.*, 11 Post. 31 (N. H.) 304; *Scales v. Chattahoochee County*, 41 Ga. 225 (1870); *Rogers v. People*, 68 Ill. 154 (1873), citing text. So also *Beach v. Leahy*, 11 Kansas, 23, 30 (1873). A school-district is bound by the contract of its board for repairs of its school-house, notwithstanding that a given sum had been voted for such repairs and expended for such object. *Conklin v. School Dist.* 22 Kansas, 521. And under a parol contract. Cases in note 2, *supra*.

<sup>1</sup> *Ante*, secs. 9, 12, 14, 17, 19-23. *Post*, secs. 46, 963-966, 1014.

<sup>2</sup> *Hamilton County v. Garrett*, 62 Tex. 602.

from private corporations aggregate, and on the other from municipal corporations proper, such as cities or towns acting under charters, or incorporating statutes, and which are invested with more powers and endowed with special functions relating to the particular or local interests of the municipality, and to this end are granted a larger measure of corporate life.

§ 26. **Same subject.**—It will appear hereafter that nearly all of the courts have drawn a marked line of *distinction between municipal corporations and quasi corporations, in respect to their liability to persons injured by their neglect of duty*; holding the former liable, without an express statute giving the action, in cases in which the latter are not considered liable unless made so by express legislative enactment. One reason given for the distinction is, that with respect to local or municipal powers proper (as distinguished from those conferred upon the municipality as a mere agent of the State) the inhabitants are to be regarded as having been clothed with them at their request and for their peculiar and special advantage, and that as to such powers and the duties springing out of them, the corporation has a *private* character, and is liable, on the like principles and generally to the same extent as a private corporation. This subject will be fully examined in its appropriate place, and is alluded to here only for the purpose of noting the distinction which has been made between municipal and public corporations.<sup>1</sup> But that a municipal corporation is in any just view a *private* corporation, or possesses a double character, the one private and the other public, although often asserted, is only true in a modified sense. In their nature and purposes, municipal corporations, however numerous and complex their powers and functions, are essentially public.<sup>2</sup>

§ 27. **Same subject.** Concerning the distinction mentioned in the preceding section, the following views may, perhaps, on principle be

<sup>1</sup> *Post*, ch. xxiii. Text approved. *Hannon v. St. Louis County*, 62 Mo. 313, 316 (1876); *Heller v. Stremmel*, 52 Mo. 309 (1873); *State v. Leffingwell*, 54 Mo. 458, 471 (1873); *Union Township v. Gibboney*, 94 Pa. St. 534.

<sup>2</sup> The doctrine of the *private character* of municipal corporations, as respects their property rights, is argued with great force by *Cooley, J.*, in *People v. Detroit*, 28 Mich. 228; s. c. 15 Am. Rep. 202. See *post*, ch. iv, secs. 58, 72, 73. In the *Roman law*, see *ante*, sec. 3. The author allows

the last two sentences of the text, as they appeared in the third edition, to stand. But to prevent misconception he now adds that while, in his judgment, a municipal corporation is essentially a *public* and not in any true sense a *private* corporation, still it does not follow that it may not have, under the Constitutions of the States, certain primordial and fundamental rights, which, although they are not beyond legislative regulation, are nevertheless beyond legislative destruction. See *post*, ch. iv.

considered as sound.<sup>1</sup> As respects the usual and ordinary legislative and governmental powers conferred upon a municipality, the better to enable it to aid the State in properly governing that portion of its people residing within the municipality, such powers are in their very nature public, although embodied in a charter and not conferred by laws general in their nature and applicable to the entire State. But powers or franchises of an exceptional, or extraordinary or non-municipal nature may be, and sometimes are, conferred upon municipalities, such as are frequently conferred upon individuals or private corporations. Thus, for example, a city may be expressly authorized in its discretion to erect a public wharf and charge tolls for its use,<sup>2</sup> or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby.<sup>3</sup> In one sense such powers are public in their nature because conferred for the public advantage. In another sense they may be considered private, because they are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality as distinct from the public at large. In this limited sense, and as forming a basis for the *implied civil liability for damages* caused by the negligent execution of such powers, it may be said that a municipality has a *private* as well as a *public* character. And so, as hereafter shown, a municipality may have property rights which are so far private in their nature that they are not held at the pleasure of the legislature.<sup>4</sup>

§ 28 (11). **The New England Town.**—In the New England States, public corporations have, in many respects, a peculiar character. In some instances, there are acts incorporating *cities*, giving them defined powers and providing a special mode of government; but even then the general laws in relation to *towns*, when not inconsistent with the provisions of the local act, ordinarily apply to the places specially incorporated. In the New England *town* proper, the citizens administer the general affairs in person, at the stated corporate or town meetings, and through officers elected by themselves.<sup>5</sup> The towns are charged with the support of schools, the

<sup>1</sup> See cases cited *post*, sec. 66; and for illustrations and application of the doctrine, *post*, secs. 57, 58, 775; also chap. xxiii., Actions, secs. 963–967, 1014, 1018. See observations of *Hunt, J.*, in *Barnes v. District of Columbia*, 91 U. S. 540 (1875); and of *Gray, C. J.*, in *Hill v. Boston*, 122 Mass. 344 (1877), noted *infra*, sec. 965.

<sup>2</sup> *Pittsburg v. Grier*, 22 Pa. St. 53 (1853); *post*, sec. 113, note, and the chapter xxiii. on Actions, secs. 966, 967, 980.

<sup>3</sup> *Ib.*, *post*, chap. xxiii. on Actions.

<sup>4</sup> Chap. iv., *post*.

<sup>5</sup> In *towns*, according to the use of the word in the New England States and some of the others, the citizens administer the general affairs in person, in town meet-

relief of the poor, the laying out and repair of highways, and are empowered to preserve peace and good order, maintain internal police, and direct and manage generally, in a manner not repugnant to the laws of the State, their prudential affairs; and for defraying these and all necessary and lawful charges, they may levy and collect taxes. Speaking generally, the New England towns are organized after the same model; and an exact notion of their character will be best obtained by reference to the leading statutory provisions in Massachusetts respecting them, given in the note.<sup>1</sup> The town in

ings. In *cities*, this is done by means of a mayor, aldermen, and council, to whom the citizens entrust most of the legislative and executive powers of the place. *State v. Glennon*, 3 R. I. 276, 278, *per Staples*, C. J. In New England, "town" is a generic term, and it will embrace *cities*, unless the contrary appears in other parts of the statute to have been the intent of the legislature. *Ib.* The reader will find the opinion of *Gray*, C. J., in *Hill v. Boston*, 122 Mass. 344; s. c. 23 Am. Rep. 332, 1877, highly instructive as to the character of New England towns and cities. As to general liabilities, there is no substantial distinction between cities and towns under the legislation of Massachusetts. *Ib.* p. 354.

<sup>1</sup> Every town has the corporate right to send representatives to the General Court (the legislature). If by a majority vote a town declines to send a representative, the dissenting minority cannot legally choose one. *Opinion Justices Sup. Court*, 7 Mass. 526; 15 Mass. 537. "Towns in *Connecticut*, as in the other New England States, differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations, into which the State is divided by the legislature, from time to time, at its discretion, for political purposes and the convenient administration of government; they have those powers only which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs; and all the inhabitants of the town are members of the *quasi* corporation." *Per Gray*, J., *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, citing 1 *Swift's System*, 116, 117; *Granby v. Thurston*, 23 Conn. 416; *Webster v.*

*Harwinton*, 32 Conn. 131; *Dillon*, *Mun. Corp.*, secs. 28-30.

SUMMARY of the leading statutory provisions in MASSACHUSETTS respecting towns:—

1. *As to powers and duties.*—They are "*bodies corporate*, with all the powers heretofore exercised by them, and subject to all the duties to which they have heretofore been subject." Gen. St. 1860, chap. xviii. sec. 1. "Towns may, in their corporate capacity, sue and be sued in the name of the town." *Ib.* sec. 8. They may hold real estate and personal property "for the public use of the inhabitants," and also "in trust for the support of schools and the promotion of education within the limits of the town." *Ib.* sec. 9. They may make *contracts* necessary and convenient "for the exercise of their corporate powers," and may dispose of their *corporate property*. *Ib.* secs. 8, 9. "They may, at legal meetings, grant and vote such sums as they judge necessary for the following purposes: For the support of town *schools*; for the relief, &c., and employment of the *poor*; for the laying out and discontinuing and repair of *highways*; for procuring the writing and publishing of *town histories*; for *burial grounds*; for encouraging the destruction of *noxious animals*; for all other *necessary charges* arising therein." *Ib.* sec. 10. "May make necessary *by-laws*, not repugnant to the laws of the State, for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof." *Ib.* sec. 11. But such by-laws must, before taking effect, be approved by the Superior Court, or, in vacation, a judge thereof. *Ib.* sec. 14. They are binding

New England, while somewhat anomalous, has some of the usual powers of a regular municipal corporation, and some of the charac-

upon all within the limits of the town, strangers as well as inhabitants. *Ib.* sec. 15.

2. *Corporate or Town Meetings.* — "Every male citizen of twenty-one years of age and upwards (except paupers, &c.), who has resided within the State one year, and within the town in which he claims the right to vote, six months, and who has paid a State or county tax, &c., shall have a right to vote upon all questions at all meetings for the transaction of town affairs, and no other person shall be entitled to vote." *Ib.* sec. 19. "The annual meeting of each town shall be held in February, March, or April; and other meetings at such time as the selectmen may order." *Ib.* sec. 20. Warrants issue for all meetings, under the hands of the selectmen, directed to constables or others, who notify such meeting in the manner prescribed by the by-laws or vote of the town. *Ib.* sec. 21. "The warrant shall express the time and place of the meeting and the subjects to be there acted upon; . . . and nothing acted upon shall have a legal operation unless the subject matter thereof is contained in the warrant." *Ib.* sec. 22. [See *infra*, secs. 266-268, as to necessity and requisites of the notice or warning.] If selectmen unreasonably refuse to call a meeting, any justice of the peace may do so upon the application of ten or more legal voters of the town. *Ib.* sec. 23. Provision is made for moderating and conducting the meeting. *Ib.* secs. 25-30. *Town officers* are elected at the annual meeting, who serve for one year, and until others are chosen and qualified. These consist of selectmen, assessors, treasurer, constables, who are *ex-officio* collectors unless others be specially chosen; field-drivers, fence-viewers, surveyors of lumber, measurers of wood, unless selectmen appoint, "and all other usual town officers." *Ib.* sec. 31. Then follows a variety of provisions respecting the duties of these several officers, and the manner of their performance. In addition, there are acts incorporating and establishing cities. "The laws in relation to towns, where not inconsistent with the general or special

provisions of the acts establishing cities, apply to them; and cities are subject to the liabilities, and city councils have the powers of towns. The mayor and aldermen shall have the powers and be subject to the liabilities of selectmen, &c., if no other provisions are made in relation thereto." Gen. St. 1860, chap. xix. 166. "The marked and characteristic distinction between a TOWN organization (in Massachusetts) and that of a CITY is, that in the former all of the qualified inhabitants meet, deliberate, act, and vote in their natural and personal capacities; whereas, under a city government, this is all done by their representatives." *Per Shaw, C. J.*, in *Warren v. Charlestown*, 2 Gray, 84, 101. As to the origin and power of towns in Massachusetts, consult *Commonwealth v. Roxbury*, 9 Gray, 451 (1857); opinion of *Shaw, C. J.*, 476, and the valuable note of Mr. (since Chief Justice) Gray, pp. 503, 528; and the opinion of the same eminent judge in *Hill v. Boston*, 122 Mass. 344 (1877); s. c. 23 Am. Rep. 332; Quincy's *Municipal History of Boston*, chap. i.; *ante*, chap. i. Towns were not expressly authorized to sue and be sued until 1694, nor formally incorporated until 1785. *Ib.* 9 Gray, 511, note "G"; 2 Dana's Ab. 698; *Willard v. Newburyport*, 12 Pick. 227, 231; *Spaulding v. Lowell*, 23 Pick. 77, 78. *Post*, sec. 187, note. The necessity of the representative system in a populous place is strikingly illustrated in *The People v. Detroit*, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202, where the legislature had provided that an important question should be decided by a vote of a citizens' meeting. Two meetings were held, but the noise, confusion, and violence prevented discussion and determination, and this provision was subsequently repealed. Speaking of the representative system in general, the learned Dr. Lieber calls it "a flower of civilization, such as neither antiquity nor the Middle Ages either enjoyed or suspected; something direct and positive in it self; . . . one of the very greatest political institutions which adorn the pages of the history of civilization, for through it alone can be



teristics of the county organizations in many of the States. The New England *town* is especially interesting as affording, perhaps, *an example of as pure a democracy* as anywhere exists. All of the qualified inhabitants meet and directly act upon and manage, or direct the management of, their own local concerns. Each citizen has a vote and an equal voice. This form of government was adopted at a very early period, and is firmly adhered to and deeply cherished by the people of the New England States. The result has demonstrated how well adapted it is to promote the well-being of the communities that for so long a space of time have thus governed themselves. The remarkable growth and prosperity of the New England States, not the most favored by nature, and the intelligence and character of the people, are known to all; and it is not strange that these results should be attributed, in a large measure, to this system of local popular government.<sup>1</sup> But, in the course of time, many of the towns, or portions thereof, grew to be large and populous, and the system of meetings of the electors, in their original capacity, became inconvenient and almost impracticable. When the population of a town or place exceeds 10,000 or 12,000 persons, the need for the representative system is urgently felt. Accordingly, in the New England States, there are now, in addition to *towns*, a large number of *incorporated cities*, with charters or constituent statutes, organized upon the usual *representative model*, with a legislative or governing body, and an executive head and subordinate officers. The people of the large city of *Boston*, in particular,

obtained real civil liberty, broad, extensive, and natural freedom." 2 Pol. Ethics, 489. History of Political Representation in England, — why it was unknown in antiquity, and why it was used and developed in England, — see Hearn, Government of England, chaps. xvii., xviii. The general justice of Dr. Lieber's eulogium cannot be denied; but this system has worked everywhere better than it has in our large cities, where the representative is often elected by those who do not pay the taxes, the expenditure of which it is his principal function to direct and control. See chap. i. *ante*, for a discussion of the defects in the practical working of our municipal corporations, and for some suggestions as to the best method of remedying them.

<sup>1</sup> Mr. Ralph Waldo Emerson took great interest in the practical workings of the town meeting system. He writes, "I see in them the safety and strength

of New England. At the town meeting one is impressed with the accumulated virility of the four or five men who speak so well to the point, and so easily handle the affairs of the town, — only four last night, and all so good that they would have satisfied me had I been in Boston or Washington. The speech of — was perfect, and to that handful of people, who heartily applauded it." And again, "The most hardfisted, disagreeably restless, thought-paralyzing companion sometimes turns out in the town meetings to be a fluent, various, and effective orator. Now I find what all that excess of power which chafed and fretted me so much in — was for." This illustrates what De Tocqueville means in the passages quoted *ante*, sec. 9, "that local assemblies of citizens constitute the strength of free nations," &c.

were wedded to the town system, and struggled long against the inevitable change to the representative plan; and five successive times between 1784 and 1821 they rejected well-considered schemes for a city government. The town continued to be governed by meetings of the electors *en masse*, acting through boards and officers, until the place had 40,000 inhabitants, of whom *seven* thousand were qualified voters. In 1822, however, the legislature, at the desire of a majority of the voters, granted the place a city charter, by which it was provided that the control of its affairs should be in a mayor and city council. After this, other towns, from time to time, made the change from the town to the city plan; so that, as before observed, we have in the New England States both modes of local administration. The *town system* is the general one; the *city, or representative system*, is the exceptional one, and is confined to places of compact population and considerable size.<sup>1</sup>

<sup>1</sup> No city was incorporated in Massachusetts until after the amendment of the Constitution of that State in 1820. *Per Shaw, C. J., in Warren v. Charlestown*, 2 Gray, 84. The purpose and effect of the change in the form of municipal governments in Massachusetts under the constitutional provision authorizing the establishment of cities, is discussed by *Gray, C. J., in Hill v. Boston*, 122 Mass. 344 (1877); s. c. 23 Am. Rep. 332. After referring to the previous attempts in 1784, 1785, 1791, 1804, and 1815, to change the town government of Boston, Mr. Josiah Quincy, in his *Municipal History of Boston*, p. 28, continues: "In 1821 the impracticability of conducting the municipal interests of the place, under the form of town government, became apparent to the inhabitants. With a population upwards of forty thousand, and with seven thousand qualified voters, it was evidently impossible calmly to deliberate and act. When a town-meeting was held on any exciting subject, in Faneuil Hall, those only who obtained places near the moderator could even hear the discussion. A few busy or interested individuals easily obtained the management of the most important affairs, in an assembly in which the greater number could have neither voice nor hearing. When the subject was not generally exciting, town-meetings were usually composed of the selectmen, the town officers, and thirty or forty

inhabitants. Those who thus came were, for the most part, drawn to it from some official duty or private interest, which, when performed or obtained, they generally troubled themselves but little, or not at all, about the other business of the meeting. In assemblies thus composed, by-laws were passed, taxes, to the amount of one hundred or one hundred and fifty thousand dollars, voted, on statements often general in their nature, and on reports, as it respects the majority of voters present, taken upon trust, and which no one had carefully considered, except perhaps the chairman. In the constitution of the town government there had resulted, in the course of time, from exigency or necessity, a complexity little adapted to produce harmony in action, and an irresponsibility irreconcilable with a wise and efficient conduct of its affairs. On the agents of the town there was no direct check or control; no pledge for fidelity but their own honor and sense of character. The prosperity of the town of Boston, under such a form of government; the few defalcations which had occurred; the frequent, and often, for years, uninterrupted re-election of the same members to the officiating boards, are conclusive evidence of the prevailing high state of morals and intelligence among the inhabitants." After mentioning the different boards among which the executive power was divided, and which acted independently

§ 29 (12). **Same subject.** — The *character of towns* in New England, and in what respects *they differ from English municipal corporations*, existing by prescription or special charter, prior to the legislation by parliament in 1835, before mentioned,<sup>1</sup> and the care to be observed in applying the English cases relating to such corporations to the town and city organizations of New England, are instructively set forth by the learned Chief-Justice Perley, in delivering the opinion of the Supreme Court of New Hampshire, in an important case to which we shall again have occasion to allude.<sup>2</sup>

of each other, and which were invested with the expending power, and, in effect, with exercise of the whole power of taxation, Mr. Quincy proceeds: "A conviction of the want of safety and of responsibility in a machine thus complicated and loosely combined became at length so general that the inherited and inveterate antipathy to a city organization began perceptibly to diminish. About this time, also, one of the most common and formal objections to a city organization was removed. The constitution of Massachusetts, which was passed in 1780, contained no express authority to establish a city organization; and in every attempt to change that of the town, it never failed to be zealously contended that the legislature of the commonwealth possessed no such power. But by the amendments to the constitution made by the convention of 1820, and adopted by the people, this power was expressly recognized. The question, therefore, now stood on its own merits, and independent of constitutional objections. The debates, also, which occurred in this convention had a tendency to open the eyes of the inhabitants to their own interests, and to allay some of the long-cherished prejudices against a city organization." In 1821 the people voted to make the change, and measures were immediately taken to obtain the sanction of the legislature. The legislature, on the 23d day of February, 1822, passed "An Act establishing the *City of Boston*," commonly called "the city charter." *The following is a brief outline of the principal features of this charter*, taken from Quincy's *Municipal History of Boston*, p. 41: (1) The title of the corporation to be, "The City of Boston." (2) The control of all its concerns is vested in a mayor, a

board of aldermen, consisting of eight, and common council, of forty-eight inhabitants, to be called, when conjoined "The City Council." (3) The city to be divided into twelve wards. The mayor and aldermen and common council to be chosen annually, by ballot, by and from inhabitants; four of the common council from and by those of each of the wards. (4) The city clerk to be chosen by the city council. (5) The mayor to receive a salary. His duty, to be vigilant and active in causing the laws to be executed; to inspect the conduct of all subordinate officers; to cause carelessness, negligence, and positive violation of the laws to be prosecuted and punished; to summon meetings of either or both boards; to communicate and recommend measures for the improvement of the finances, the police, health, security, cleanliness, comfort, and ornament of the city. (6) The mayor and aldermen are vested with the administration of the police and executive power of the corporation generally, and with specific enumerated powers. (7) All other powers belonging to the corporation are vested in the mayor, aldermen, and common council, to be exercised by concurrent vote. *Post*, sec. 187, note. Boston has an amended or reformed charter dating from 1854, but the changes are not structural. They give the mayor increased power. The City Council still consists of two branches. Certain executive officers are elected by the people, and others are appointed by the mayor and aldermen. See Bugbee, "City Government of Boston," in *Johns Hopkins University Studies*, 1887, fifth series.

<sup>1</sup> *Ante*, chap. i.; *post*, chap. iii.

<sup>2</sup> *Eastman v. Meredith*, 36 N. H. 284,

He says: "It is to be observed that municipal corporations in England are broadly distinguished in many important respects from towns in this and the other New England States. There is no uniformity in the powers and duties of English municipal corporations. They were not created and established under any general public law, but the powers and duties of each municipality depended upon its own individual grant or prescription. Their corporate franchises were held of the crown by the tenure of performing the conditions upon which they had been granted, and were liable to forfeiture for breach of the conditions. They indeed answered certain public purposes, as private corporations do which have public duties to perform, and some of them exercised political rights. But they are not like towns (with us) general political and territorial divisions of the country, with uniform powers and duties, defined and varied, from time to time, by general legislation. Towns (in New England) do not hold their powers ordinarily under any grant from the government to the individual corporation; or by virtue of any contract with the government, or upon any condition, express or implied. They give no assent in their corporate capacity to the laws which impose their public duties or fix their territorial limits." And referring to the case then before the court, he added: "In all that is material to the present inquiry, municipal corporations in England bear much less resemblance to towns in this country than to private corporations which are charged with the performance of public duties; and for these reasons the English authorities on the subject are but remotely applicable to the present case."<sup>1</sup>

§ 30 (12 a). **Legal powers of New England towns.**— *The distinctive character of the New England towns*, and particularly the limited nature of their powers, will be further seen by a brief glance at the course of judicial decisions with respect to their authority to make contracts and to obtain revenue. Money can only be raised by them for the purposes expressed in the statute, and for expenses incident to such purposes. The power of the majority is wisely limited by law to the object and cases which are clearly provided for and defined by statute.<sup>2</sup>

290 (1858). And see also *Hill v. Boston*, *supra*; *post*, secs. 32, 35, 37, 183.

<sup>1</sup> Mr. Bryce, in his "American Commonwealth," has two interesting chapters on the subject of rural local government in the United States. He traces the origin and influence of the New England town (chaps. xlviii. and xlix.). Prof. Herbert

B. Adams has an essay on the "Germanic Origin of New England Towns," in Johns Hopkins University Studies, first series.

<sup>2</sup> *Stetson v. Kempton*, 13 Mass. 272 (1816); *Parsons v. Goshen*, 11 Pick. 396 (1831). "This limitation," says Mr. Justice *Wilde*, with great truth, in the case last cited, "upon the power and authority

Thus a town, under a statute which restricts it to raising money to provide for "the poor, for schools, for the support of public wor-

of towns to enter into contracts and stipulations, is a wise and salutary provision of law, not only as it protects the rights and interests of the minority of the legal voters, but as it may not unfrequently prove beneficial to the interests of the majority, who may be hurried into rash and unprofitable speculations by some popular or delusive excitement, to the influence of which even wise and considerate men are sometimes liable. A town in its corporate capacity will not be bound, even by the express vote of the majority, to the performance of contracts or other legal duties, not coming within the scope of the objects and purposes for which they are incorporated." The power of towns to raise money is discussed at large by *Endicott, J.*, in *Minot v. West Roxbury*, 112 Mass. 1 (1873); s. c. 17 Am. Rep. 52; cited *post*, ch. xxii. *Anthony v. Adams*, 1 Met. (Mass.) 284, 286 (1840), *per Shaw, C. J.*; quoted and followed in *Vincent v. Nantucket*, 12 Cush. 105 (1853). See also *Norton v. Mansfield*, 16 Mass. 48; *Dill v. Wareham*, 7 Met. (Mass. 1844) 438 (contract by the town, undertaking to transfer the right of taking oysters within its limits).

Whether towns in Massachusetts are authorized by statute to make any contracts which involve the payment of money, unless the contracts are such that a tax on the inhabitants may be laid to raise the money, does not seem to be settled by express adjudication. *Bancroft v. Lynnfield*, 18 Pick. 566 (1836), *per Shaw, C. J.*; *Tash v. Adams*, 10 Cush. 252 (1852).

"The inhabitants of every town in this state" — Maine — says *Shepley, C. J.*, in *Hooper v. Emery*, 14 Maine (2 Shep.), 375 (1837), "are declared to be a body politic and corporate by the statute; but these corporations derive none of their powers from, nor are any duties imposed upon them by the common law. They have been denominated *quasi* corporations, and their whole capacities, powers, and duties are derived from legislative enactments." See also *Pittson v. Clark*, 15 Maine, 460, 463; *Augusta v. Leadbetter*, 16 Maine, 45

(1839); *Estes v. School Dist.*, 33 Maine, 170 (1871); *Mitchell v. Rockland*, 45 Maine, 496, 504 (1858); *Salem Mill Dam v. Ropes*, 6 Pick. 23, 32; *School Dist., &c. v. Wood*, 13 Mass. 193 (1816), *per Parker, C. J.*; *Mower v. Leicester*, 9 Mass. 247, 250 (1812). The legislature may authorize and require a town in Massachusetts to raise and expend money for public use within its limits, or for reimbursing money paid for such public use. *Agawam v. Hampden*, 130 Mass. 528, and cases cited. Non-residents of municipalities. *Post*, sec. 195.

Where the legislature has prescribed the purposes for which money may be raised by taxation, it cannot be raised for other and distinct purposes; nor when it is raised and collected for authorized and proper purposes can it be appropriated to or expended upon other and different objects. This would be to break down and defeat the limitation. Hence towns cannot give away or distribute, *per capita* or otherwise, money collected by taxation. *Hooper v. Emery*, 14 Maine (2 Shep.), 375, explaining *Ford v. Clough*, 8 Greenl. (Maine) 334; *Davis v. Bath*, 17 Maine, 141 (1840); *Pease v. Cornish*, 19 Maine, (1 Appl.), 191 (1841); *Stetson v. Kempton*, 13 Mass. 272; *Dillingham v. Snow*, 5 Mass. 547; *Spaulding v. Lowell*, 23 Pick. 71 (1830); *Woodbury v. Hamilton*, 6 Pick. 101; *Cooley v. Granville*, 10 Cush. 56.

The Vermont statute respecting the powers of towns is nearly a transcript of that of Massachusetts. The Supreme Court of Vermont approves of the exposition of the statute given by the Supreme Court of Massachusetts in *Willard v. Newburyport*, 12 Pick. 230; *Allen v. Taunton*, 19 Pick. 485; *Torry v. Milbury*, 21 Pick. 64; *Spaulding v. Lowell*, 23 Pick. 71; *Hardy v. Waltham*, 3 Met. 163, *per Isham, J.*, in *Van Sicklen v. Burlington*, 27 Vt. (1 Wms.) 70. For discussion of powers and duties of *selectmen*, and digest of previous decisions in *New Hampshire*, see *Carleton v. Bath*, 2 Fost. (22 N. H.) 559. Have no general authority to bind the town by contract. *Andover v. Graf-*

ship, and other *necessary* charges," cannot raise money, even in the time of war, and when the town is in immediate danger from the enemy, for the payment of additional wages to the drafted and enlisted militia, and for other purposes of defence. This is not a *corporate* duty, but the duty of the general government.<sup>1</sup> Nor can it appropriate money, contract for, or levy a tax to aid in the construction of a road, which, by law, is to be made at the expense of the *county*, and not the town.<sup>2</sup> A town may, it is said, raise money to meet ordinary expenditures, such as the payment of officers, the support and defence of actions, the expenses incident to discharging duties imposed by law, looking to the safety and convenience of the citizens. Thus it can erect a town or city hall, or market-house, but not a theatre, a circus, or any place of mere amusement, nor even a statue or monument, unless in populous and wealthy towns as suitable ornaments to public buildings or squares.<sup>3</sup> So towns may provide for the support of a public clock, hay-scales, burying-ground, wells, reservoirs, and many other like objects, which relate to the accommodation and convenience of the inhabitants, and which have been placed under the municipal jurisdiction of towns by statute or by usage.<sup>4</sup>

ton, 7 N. H. 300. But are confined to such acts as are necessary to the discharge of their duties. *Sanborn v. Deerfield*, 2 N. H. 253. Cannot, *ex-officio*, adjust controversies of suits, or release a cause of action. *Carleton v. Bath*, 2 Fost. (22 N. H.) 559. May indemnify town officers in proper cases. *Pike v. Middleton*, 12 N. H. 278. *Post*, sec. 147. But there is no promise implied in law against a town to indemnify selectmen in any case for damages which they have been compelled to pay, arising out of the discharge of official duty. *Eaves v. Shattuck*, 35 N. H. 189. Are supposed to be liable to the corporation for gross neglect of official duty. *Sanborn v. Deerfield*, 2 N. H. 253, by *Woodbury, J.* Notes made by a treasurer of a New England town to a bank, in payment for money borrowed without the knowledge of the town, are not binding upon the town, unless authorized by a vote of the town at a meeting duly warned for that purpose, or ratified by the vote of such a meeting duly warned for the purpose of such ratification. *Bloomfield v. Charter Oak Bank*, 121 U. S. 121 (1886). See *infra*, secs. 266-268.

<sup>1</sup> *Stetson v. Kempton*, 13 Mass. 272

(1816), where the phrase, *necessary town charges*, is construed by *Parker, C. J.*; and see comment of *Shaw, C. J.*, 12 Pick. 227, 230; s. c. 23 Pick. 74; and of *Dewey, J.*, in *Allen v. Taunton*, 19 Pick. 485, 487; 18 Pick. 566; 10 Cush. 57; of *Clifford, J.*, in *Burrill v. Boston*, 2 Clifford, C. C. 590 (1867).

<sup>2</sup> *Parsons v. Goshen*, 11 Pick. 396 (1831); *Anthony v. Adams*, 1 Met. (Mass.) 284 (1840).

<sup>3</sup> *Stetson v. Kempton*, 13 Mass. 272 (1816), *per Parker, C. J.*; *Allen v. Taunton*, 19 Pick. 485, 487, opinion by *Dewey, J.*, as to power of towns in Massachusetts; *Spaulding v. Lowell*, 23 Pick. 71; opinion of *Shaw, C. J.*, on same subject.

<sup>4</sup> *Willard v. Newburyport*, 12 Pick. 227, 230 (1831). General municipal powers held to include power to erect a town-hall. *Greeley v. People*, 60 Ill. 19 (1871); *Bell v. Platteville*, 71 Wis. 139. But does not include power to defray expenses of a committee to petition the legislature to destroy the existence of the town by annexing it to another town. *Minot v. West Roxbury*, 112 Mass. 1 (1878); s. c. 17 Am. Rep. 52; *Coolidge v. Brookline*, 114 Mass. 592 (1874). *Lia-*

§ 31 (14). Each one of the United States, in its organized political capacity, although it is not in the proper use of the term a corporation, yet it has many of the essential faculties of a corporation, a distinct name, indefinite succession, private rights, power to sue, and the like. Corporations, however, as the term is used in our jurisprudence, do not include States, but only derivative creations, owing their existence and powers to the State acting through its legislative department. Like corporations, however, a State, as it can make contracts and suffer wrongs, so it may, for this reason and without express provision, maintain in its corporate name actions to enforce its rights and redress its injuries.<sup>1</sup> But a State is not liable to be sued without its consent;<sup>2</sup> although it is not unusual for States, by special provision, to authorize suits to be brought against them, but, as the permission is voluntary, they may prescribe the terms, and, unless it impairs the obligation of existing contracts, may withdraw the consent at pleasure.<sup>3</sup> The like distinction between the State and its corporate creations existed in the Roman law. The State like the corporation was a Juristical Person, but unlike corporations it was not subject to the jurisdiction of any judge. Corporations were the subject of Private-law relations, but not so the State or Fiscus. The jural relations of the State and of corporations are, in many respects, essentially dissimilar.<sup>4</sup> A devise to a State for any object which it may properly aid or provide for is valid.<sup>5</sup> Extended consideration of the powers of the States, and of their relation to the United States and to each other, is not within the scope of the present work, which is limited strictly to municipal corporations.

*bility of towns in actions of tort.* See *post*, chap. xxiii. *Private property of the inhabitants* may be taken to satisfy a judgment against the town. *Post*, sec. 962, note and cases, chap. xxii.

<sup>1</sup> *Delafield v. Illinois*, 2 Hill (N. Y.), 159, 162; 26 Wend. 192 (1841), affirming s. c. 8 Paige, 531; *Indiana v. Woram*, 6 Hill (N. Y.), 33 (1843). These cases hold that States may sue as plaintiff in the State courts. *State v. Delesdenier*, 7 Tex. 76; *People v. Assessors*, 1 Hill (N. Y.), 620. The governor of a State, as the head of the executive department, is a corporation sole, and bonds made payable to him may be enforced for the benefit of those interested. *Governor v. Allen*, 8 Humph. (Tenn.) 176 (1847); *Polk, Governor, v. Plummer*, 2 Humph. 500.

<sup>2</sup> *Briscoe v. Bank*, 11 Pet. 257, 321.

<sup>3</sup> *Beers v. Arkansas*, 20 How. 527 (1857); *Dodd v. Miller*, 14 Ind. 433; *Auditor v. Davies*, 2 Pike (Ark.), 494; *Ellis v. State*, 4 Ind. 1; *State v. Trustees*, 5 Ind. 77. The Supreme Court of the United States has original jurisdiction in cases in which a State shall be a party, as also in suit between States. *Kentucky v. Dennison*, 24 How. 66; *Wisconsin v. Duluth*, 2 Dillon, C. C., 406 (1872). The United States Circuit Court has not. *Ib.*

<sup>4</sup> *Savigny, Jural Relations* (Rattigan's Translation, secs. 86, 87). *Ante*, sec. 3. *Post*, sec. 45, note.

<sup>5</sup> *McDonough Will Case*, 15 How. 367, 382 (1853); *post*, sec. 569.

## , CHAPTER III.

CREATION, AND SEVERAL KINDS OF MUNICIPAL CORPORATIONS IN  
ENGLAND AND IN THE UNITED STATES.

*In England.* — *Difference between Regal and Parliamentary Corporations.* — *Municipal Corporations Act of 1835.*

§ 32 (15). **Creation and kinds in England ; Charter defined.** — In England, corporations can be *created* only in one of two ways : 1, by the king's charter : 2, by act of parliament. They *exist* there, however, — 1, by the common law ; 2, by prescription ; 3, by royal charter ; 4, by authority of parliament. Corporations at *common law* are those which derive their existence and powers from immemorial usage, although they may have had their origin in an act of parliament or royal grant, no longer discoverable. Those by *prescription* presuppose a grant by charter or act of parliament, which has been lost. Into corporations created by regal or legislative grant may be resolved what have been styled corporations by *implication*, which is, where a body, lawfully constituted, cannot carry into effect its purposes without attributing to it a corporate character. The franchise of being a corporation, and the right to exercise corporate powers and to enjoy corporate privileges, can be claimed in no other way than as above stated. A legal sanction to the corporate character is, therefore, absolutely necessary, and is always implied.<sup>1</sup>

The distinction between corporations deriving their existence from the king's charter and those which derive their existence from parliament is important. A *royal charter* is a written instrument, in the form of letters-patent, under the great seal, addressed to all the subjects of the realm, containing a grant by the crown to the persons named, of the franchises, powers, and privileges therein mentioned. A *charter of incorporation*, therefore, is the written instrument by which the king creates the corporate body, names it, defines its objects, and confers its powers. Unless restricted in the charter, all of the common-law incidents of a corporation attach to

<sup>1</sup> Willc. 21 ; Glover, 23 ; Grant, 6, 7 ; Louis v. Allen, 13 Mo. 400 ; St. Louis v. 1 Kyd, 39 ; Angell & Am, sec. 69 ; Bro. Russell, 9 Mo, 503. Post, secs. 42, 84, Corp. 65 ; Eastman v. Meredith, 36 N. H. note.  
284, 290 (1858), per Perley, C. J. ; St.



it, but no corporation can pursue objects not warranted by its charter. The charter is the organic act which gives to the corporation both its existence and its peculiar character.<sup>1</sup>

§ 33. **Royal and Parliamentary Charters.** — The *king's charter* may confer upon the corporation it institutes all the usual and ordinary powers of a corporate body, but it cannot invest such a body with extraordinary powers, such as proceeding in a manner different from the common law, or punishing by forfeiture or imprisonment, or conferring an *exclusive* right of trading. When the king grants clauses which are illegal they are void; and if illegal and not confirmed by parliament, no length of time or of usage will make such clauses valid. But *parliament*, in the fulness of its power, may grant to corporations which it erects such powers, ordinary and extraordinary, as it deems proper; and it may, as it has often done, confirm clauses in royal charters which were void, because beyond the king's power to grant.

§ 34. **Assent and Acceptance of Grantee; Revocation.** — The *king* cannot incorporate a body of men *without their assent*. Until his charter has been *accepted*, it is therefore inoperative.<sup>2</sup> When once accepted, the acceptance is irrevocable. The acceptance must be by the grantees; and it is held that a valid acceptance may be made by a majority of the grantees. The charter must be accepted *in toto*, or not at all, for there can be no partial acceptance without the assent of the crown, which must be shown by matter of record. If the corporation be a new one, acceptance of part of the charter is taken as acceptance of all. Acceptance may be shown by user, — by acting under it, as well as by the formal action of the corporate body. After acceptance the *crown cannot resume the grant*, or dissolve or destroy the corporation, without the consent of the grantees or their successors. The crown, at common law, can create a corporation for municipal government in any place where there is not at the time an existing corporation

<sup>1</sup> Outline of municipal charter of the Middle Ages. *Ante*, sec. 6. Charters defined. *Post*, sec. 82.

<sup>2</sup> Acceptance of charter. *Post*, secs. 44, 54, 65; chap. xxi. As acceptance was necessary to make the king's charter operative, the municipal charters which he gave were all given to existing communities having a recognized and organized existence, and in the habit of acting as one body, through elections or agencies or

offices. Per *Campbell, J.*, in *People v. Bennett*, 29 Mich. 451 (1874); s. c. 18 Am. Rep. 107. Towns and cities, that is, compact bodies of people, have a natural existence, and what may be called a natural *quasi* corporate character. It was so in Rome. *Ante*, sec. 3. And so in England. "Each town was regarded as a corporate community," prior to any actual grant of a charter. Hearn, Government of England, 475, 501. *Post*, secs. 53, 183.

of the same kind, but there cannot be concurrently two corporations for the same place, having the same or similar powers or jurisdiction. But the limitations upon the power of the crown do not apply with respect to municipal corporations *created by parliament*. Its power is, legally speaking, illimitable. It may create or abolish and change at its pleasure, with or without the assent of the people or corporation to be thereby affected. It may change royal charters; but parliamentary corporations cannot be affected, without the consent of parliament, by charters granted by the crown. Except as to the extent of powers which may be conferred, a parliamentary corporation is, at common law, similar to that which is created by the crown.<sup>1</sup>

§ 35 (16). **Constitution of an old English Municipality.** — Prior to 1835 *many of the towns, boroughs, and cities of England were incorporated* in one of the ways mentioned; that is to say, there were in them bodies corporate, established for the local government thereof. There was no uniformity in the constitution or powers of these corporate bodies. The corporation proper was not the town or place, but *a corporate body constituted within it*, with powers or jurisdiction, more or less extensive, to govern the inhabitants. These bodies were established at different times, and from different motives. The first distinct recognition of a municipal corporation was in the 18th of Henry VI. (A. D. 1439), with reference to Kingston-upon-Hull, which had an express charter of incorporation granted to it, for the first time, in that year. Charters had previously been granted to it by different sovereigns, at various times, giving it various privileges, but they did not *incorporate* the place, nor was it incorporated until the charter of 18th Henry VI., which is the first that uses terms of incorporation.<sup>2</sup> Subsequently such corporations were erected from time to time, each with its peculiar constitution, depending on the provisions of the charter or prescriptive usage. The constitution of the corporations was so various, and is so different from the American model, that it requires care to get an accurate idea of it. For illustration, we will take a simple form, viz.: where by charter or by prescription the corporation consists of the mayor, aldermen, and commonalty of a town. Here there are three ranks, classes, or parts: 1, the mayor, or head officer; 2, the aldermen, the number of whom is definite,

<sup>1</sup> Authorities last cited. Respecting the authority of the crown to grant charters to incorporate towns, since the General Municipal Corporations Act of 1835,

see *Rutter v. Chapman*, 8 M. & W. 1; *Reg. v. Boucher*, 3 Q. B. 654; s. c. 2 G. & D. 737.

<sup>2</sup> *Glover on Munic. Corp.* 16.

being fixed by the charter, or by prescriptive usage; 3, the commonalty, that is, the common freemen, whose number is indefinite, and whose rights in the course of time were largely usurped or destroyed.<sup>1</sup> These three classes were denominated the *integral parts* of the corporation, and no corporation was complete (except it be otherwise provided by the charter) unless the mayor, or head officer, a majority of the definite class (that is, a majority of the aldermen), and some members of the indefinite class, or commonalty, be in existence. Hence, during a vacancy in the office of mayor, no valid corporate act can be done except to elect another, since without a mayor the corporate body is incomplete. Hence, also, at every corporate meeting it was essential, at common law, that there should be present the mayor, or head officer, whose duty it was to preside, also a majority of each definite integral class, and some members of each indefinite class, if there be more than one such class.

§ 36. **Municipal Corporations Reform Act of 1835, and Revised Act of 1882.**—In the course of time, as we have already pointed out, *great abuses had crept into these bodies*, which parliament had frequently been obliged to redress.<sup>2</sup> Complaints of grievances were universal, and misrule, confusion, and internal disputes were so general that the municipal system of government fell into great and deserved disrepute. As a measure of reform, the MUNICIPAL CORPORATIONS ACT of 5 and 6 Wm. IV. ch. lxxvi., was devised and enacted.<sup>3</sup> "I cordially concur," said the king, "in this im-

<sup>1</sup> *Ante*, sec. 8.

<sup>2</sup> Introductory chapter, *ante*, sec. 8. *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.), 425.

<sup>3</sup> The reformed House of Commons presented an address to William IV., requesting the appointment of a commission to inquire into the state of the municipal corporations in England and Wales. The commission which was appointed made a thorough examination of the condition of the various boroughs, and their report disclosed abuses and defects which it seems marvellous that any spirited people so long endured. See chap. i., *ante*, sec. 8.

OFFICIAL REPORT *as to the ABUSES AND DEFECTS found to exist in the municipal corporations of England and Wales.*—The commission ascertained the existence of two hundred and forty-six corporations in England and Wales, exercising

municipal functions. The population of these corporate places exceeded two millions of people. Some of these corporations claimed to act under prescriptive custom, but most of them under several charters, forming a continued series from a very early date, but generally under charters granted from the reign of Edward I. down to the reign of George IV. inclusive. The number of corporators stated to be definite, in fifty boroughs, varied in most cases from under ten to thirty, and those indefinite, in one hundred and sixty-two boroughs, varied from twelve to five thousand, but usually averaged from fifty to two hundred corporators. The *titles to freedom, or citizenship*, generally comprehended those arising from birth, servitude, marriage, purchase, gift, or election. The *governing bodies* were formed by the close and corrupt system

portant measure, which is calculated to allay discontent, to promote peace and union, and to procure for those communities the ad-

of *self-election* in a great majority of the municipalities. The corporate officers, such as the mayor, or other head of the corporation, the recorder — frequently unprofessional — and the town-clerk, were appointed by the self-elected governing body from its own immaculate conclave. Some of the municipalities possessed exclusive *criminal jurisdiction*, extending to the trial of felonies and all other offences, whereas many appear never to have had any criminal jurisdiction. Several *boroughs* had civil jurisdiction extending to the decision of all actions, — some extending to the decision of personal and mixed actions; others to the decision of personal actions; while in a considerable number no civil jurisdiction appeared ever to have existed. *The property* in some few boroughs was trivial, but the revenue generally averaged from £500 to £1,000 in each, while in some the property exceeded £50,000 per annum. In a few towns corporate the accounts were printed for distribution and audited publicly; but in most cases the accounts were neither duly kept, nor audited, nor published, besides being inaccurate and in a generally unsatisfactory state. The annual income of these municipal corporations amounted to about £366,000, and the expenditure to £377,000, while the debt in one hundred and thirty-three exceeded the sum of two millions sterling. Throughout the course of the investigation of the commissioners there were perceptible the same complaints, — of magistrates ill-qualified by education and habits for their situations, generally partial, and sometimes corrupt; of courts, which might be made the instruments of much local advantage, falling into disuse through defects of their original constitution and their recent maladministration; of juries improperly selected by reason of notorious party bias; of revenue misapplied; of debt contracted and of property alienated; of the absence of all accounts and the denial of all accountability by certain corporations; of the insufficiency of the police, the neglect of paving and lighting, and the want of those municipal accommodations for which the

public property committed in trust to the corporation would, if duly administered, be amply sufficient to provide. Having given a general view of the ordinary constitution of the various municipalities, the commissioners next proceeded to specify some of their defects. The most common and most *striking defect* in the constitution of the municipal corporations was, that the *corporate bodies existed independently of the communities among which they were found*. The corporators looked upon themselves, and were considered by the inhabitants, as separate and exclusive bodies; they had powers and privileges within the towns and cities from which they were named, but in most places all *identity of interest* between the corporation and the inhabitants disappeared. That was the case even where the corporation included a large body of inhabitant freemen. It appeared in a more striking degree as the powers of the corporation had been restricted to smaller numbers of the resident population, and still more glaringly when the local privileges had been conferred on *non-resident freemen*, to the exclusion of the inhabitants to whom they rightfully ought to belong. The privilege of electing *members of parliament* being that which, before the passing of the Reform Act, conferred upon the self-elected governing bodies of close corporate towns their principal importance, and the rewards for political services which the patron was accustomed to distribute among them, caused this function to be considered in many places as the sole object of their institution. The power so monopolized, and employed in a mode unsuitable to the altered circumstances of the times, led to various abuses of the system. The custom of keeping the number of corporators as low as possible may be referred to the wish for preserving the parliamentary franchise rather than to the desire of monopolizing the municipal authority, which had been coveted only as a means of securing the other and more highly prized privilege. A great number of corporations were preserved solely as *political engines*, and the towns to which they be-

vantages of responsible government." This act organizes all of the municipal corporations of England and Wales *upon a uniform model*. It does not altogether destroy their previously existing lawful corporate powers, but it does sweep away all laws, statutes, charters, and usages inconsistent with or contrary to its provisions. It defines who shall be burgesses or citizens, making the right essentially to depend upon occupancy of houses or shops within the

longed derived no benefit, but often much injury, from their existence. To maintain the political ascendancy of a party, or the political influence of a family, was the one end and object for which the powers entrusted to a numerous class of these bodies have been exercised. This object was systematically pursued in the admission of freemen, resident or non-resident; in their election of municipal functionaries for the council or the magistracy; in the appointment of subordinate officers and the local police; in the administration of charities entrusted to the municipal authorities; in the expenditure of the corporate revenue, and in the management of the corporate property. The most flagrant abuses arose from this perversion of municipal privileges to political objects. Thus the inhabitants had to complain, not only that the election of their magistrates and other municipal functionaries was made by an inferior class of themselves, or by persons unconnected with the town, but also of the disgraceful practices by which the magisterial office was frequently obtained; while those who, by character, residence, and property, were best qualified to direct and control its municipal affairs were excluded from any share in the elections or management. The exclusive and party spirit belonging to the whole corporate body appeared in a still more marked manner in the councils by which in most cases it was governed. These councils were usually *self-elected*, and held their offices *for life*. They were commonly of *one political party*, and their proceedings were mainly directed to secure and perpetuate the ascendancy of the party to which they belonged. Individuals of adverse political opinions were, in most cases, systematically excluded from the governing body. These councils, which embodied the opinions of a single party, were entrusted with the nomination of

magistrates, of the civil and criminal judges, often of the superintendents of police, and were, or ought to have been, the leaders in every measure that concerned the interests and prosperity of the town. So far from being the representatives either of the population or of the property of the town, they did not represent even the privileged class of freemen; and being elected for life, their proceedings were unchecked by any feeling of responsibility. The commissioners reported that there prevailed amongst the inhabitants of a great majority of the incorporated towns a general and a just dissatisfaction with their municipal councils, whose powers were subject to no proper control, whose acts and whose proceedings, *being secret*, were unchecked by the influence of public opinion; a distrust of the municipal magistracy, tainting with suspicion the local administration of justice, and often accompanied with contempt of the persons by whom the law was administered; a discontent under the burdens of local taxation, while revenues that ought to be applied for the public advantage were diverted from their legitimate use, and sometimes wastefully bestowed for the benefit of individuals, sometimes squandered for purposes injurious to the character and morals of the people. The commissioners therefore felt it their duty to represent to his Majesty that the municipal corporations of England and Wales *neither possess nor deserve* the confidence or respect of his Majesty's subjects, and that a thorough reform must be effected before they can become what they ought to be, — useful and efficient instruments of local government. Glover's Historical Summary of the Corporate System of Great Britain and Ireland, pp. 38 to 45. The result was the municipal Corporations Act of 5 & 6 Wm. IV. chap. lxxvi. See chap. 1, *ante*, sec. 8.

borough, and the payment of taxes for the relief of the poor. These burgesses or citizens elect, from time to time, a fixed number of proper persons to be councillors, and the council (composed of the mayor, aldermen, and councillors) elect, from qualified persons, the aldermen, and also the mayor and the ministerial and inferior corporate officers. *The council* is the governing body of the corporation, and its most important powers are defined by various acts of parliament. It will thus be perceived that the original power is in the burgesses or citizens; that the act adopts the representative system, and proceeds upon the idea that a substantial interest in the incorporated place, which is made necessary in order to be a burgess or citizen, will induce care in the selection of councillors; and that frequent elections will prove the most effectual check on those entrusted with the administration of the municipal authority, which is carefully limited and defined.

The act of 1835, with its amendments, re-enacted and consolidated by the Municipal Corporations Act of 1882, 45 and 46 Vict. ch. 50; L. R. 18 Stats. 205, which went into force January 1, 1883, constitutes the body of the existing English municipal corporations system. The leading provisions of the Act of 1835 are so important to be understood in the study and application of the English cases decided thereunder to questions arising in this country, and contain so much of interest to the lawyer, the legislator, and the municipal inquirer, that they are given or referred to in the note to this section.<sup>1</sup> Be-

<sup>1</sup> MUNICIPAL CORPORATIONS ACT OF 5 AND 6 WM. IV. CHAP. LXXVI., ENACTED SEPT. 9, 1835, AND CODIFIED BY THE MUNICIPAL CORPORATIONS ACT OF 1882, 45 AND 46 VICT. CHAP. L. — NAME, etc. This act commences by reciting, that "whereas divers bodies corporate at sundry times have been constituted within the cities, towns, and boroughs of England and Wales, to the intent that the same might forever be and remain well and quietly governed; and it is expedient that the charters by which said bodies corporate were constituted should be altered in the manner hereinafter mentioned; be it therefore enacted, that so much of all laws, statutes, and usages, and so much of all royal and other charters, now in force, relating to the several boroughs named in schedules (A and B) annexed, as are inconsistent with, or contrary to, this act, *shall be*, and the same are hereby, *repealed and annulled*" (sec. 1), with the reservation of certain rights, beneficial exemptions, and

franchises to the freemen or citizens. (Secs. 2-5.) These schedules contain an alphabetical list of all the incorporated boroughs, with the number of wards, number of aldermen, and number of councillors, and style of the corporate body in each; thus: "*Bath*, — Seven wards, fourteen aldermen, forty-two councillors. *Corporate name*, — Mayor, Aldermen, and Citizens of the City of Bath." If it be a *borough* instead of a city, the word "Burgesses" is used instead of "Citizens." The act provides that the body corporate in each of said places "shall take and bear the name of the Mayor, Aldermen, and Burgesses [or Citizens, in case of a city] of such borough, and by that name shall have perpetual succession, and shall be capable in law, *by the council* hereinafter mentioned of such borough, to do," &c. (Sec. 6.) Name under Act of 1882 is same. (Sec. 8.) "MUNICIPAL CORPORATION," as used in the Act of 1882, means the body corporate constituted by

tween 1835 and 1882, not less than fifty-five acts were passed more or less relating to municipal corporations, and in general amenda-

the incorporation of the inhabitants of a borough. Act 1882, sec. 7. "The municipal corporation of a borough shall be capable of acting by the council of the borough, and the council shall exercise all the powers vested in the corporation by this act or otherwise. The Council shall consist of the Mayor, Aldermen, and Councillors." Act 1882, sec. 10.

**MEMBERSHIP.**—Before the passage of the act under consideration, the qualifications for members or officers of municipal corporations depended upon the charter, usage, or by-laws of the particular corporation, the usual qualifications being that the person claiming to be admitted to the freedom of the corporate town should be the son of a freeman, or should have served an apprenticeship to a freeman, or (in some instances) married his daughter, or acquired the privilege by gift or purchase; but this act provides that hereafter "no person shall be elected, made, or admitted a burgess or freeman of any borough by gift or purchase." (Sec. 3.) It fixes the *qualification of burgesses or citizens*, thus: "Every male person, of full age, who shall have occupied any house, warehouse, counting-house, or shop, within any borough" for three years, "and during the time of such occupation been an inhabitant householder within the borough, or within seven miles of the borough, shall, if duly enrolled, be a *burgess of such borough and a member of the body corporate of the mayor, aldermen, and burgesses of such borough*, provided he shall have been rated in respect to the premises so occupied by him to all rates made for the relief of the poor within the parish." (Sec. 9.) *Such resident occupiers and taxpayers, only*, are members of the corporate body of the place; all the other inhabitants are no part of the municipal corporation, though subject to its government.

The Act 1882 changes the qualifications of a burgess from three years to one year, and in some other minor respects. (Sec. 9.) *Women* may vote at municipal elections if otherwise qualified, but not married women. Act 1882, sec. 63, based on the Act of 1872 (32 & 33 Vict. chap. lv. sec.

9), which first admitted women to the municipal franchise. The Married Woman's Property Act (33 & 34 Vict. chap. xciii.), does not remove or affect the political disabilities of married women. See *Regina v. Harrauld*, L. R. 7 Q. B. 361.

**COUNCILLORS, HOW CHOSEN, &c.**—Upon the first day of November, in every year, the *burgesses* so enrolled in every borough *shall openly assemble*, and elect from the persons *qualified to be councillors* [who must have the qualifications of a burgess, and also increased pecuniary and rating qualifications] the councillors of the borough" (sec. 40), of whom one-third part go out of office annually. The elections are held before the mayor and assessors, and the mode of voting (which is exactly the opposite of the ballot in America), is by delivering to the officers of election a voting-paper containing the name and abode of the person voted for, and signed with the name and abode of the voter. It is thus seen that the burgesses elect the councillors, whose qualifications are fixed by the statute, and whose number in each incorporated place is definite. Under Act 1882, the term of councillor is three years, and his qualifications are somewhat changed from those in the Act of 1835.

**ALDERMEN, HOW CHOSEN.**—On the ninth day of November, in every third succeeding year, the council for the time being are directed to elect, "*from the councillors, or from persons qualified to be councillors*, the aldermen of the borough," who are one-third in number of the councillors. (Sec. 25.) The manner of election is prescribed, namely, by every member of the council delivering to the mayor or chairman a voting-paper signed by the member voting, which the mayor or chairman is directed openly to read. (Act. 7 Wm. IV. and 1 Vict. chap. lxxviii. sec. 14; 16 and 17 Vict. chap. lxxix. sec. 13.) Term of aldermen under Act of 1882, is six years. (Sec. 14.)

**MAYOR, HOW CHOSEN.**—At the meeting of the council, to be held on the ninth day of November, each year, the council are directed to *elect, out of the aldermen or*

tory of the Act of 1835. The Act of 1882 revises or codifies all the legislation, including the Act of 1835 upon the subject of the Municipal Corporations of England. The substance of the Act of 1835 still remains as re-enacted in the Act of 1882. Its provisions extend to Wales, but not to Scotland or Ireland.

*In the United States.*

**§ 37 (17). Legislative Sanction essential to Corporate Existence; Prescription.**—The proposition which lies at the foundation of the

*councillors*, a fit person to be the *mayor*, who shall continue in office for one year (sec. 49), and until his successor shall have accepted and qualified. (6 and 7 Wm. IV. chap. cv. sec. 4.) So by the Act of 1882, sec. 15, except that the mayor may be elected from any persons who are qualified to be aldermen or councillors.

WHO COMPOSE THE COUNCIL, &c. — The mayor, the aldermen, and the councillors, for the time being, constitute the *council* of the borough. (Sec. 25.) So by the Act of 1882, sec. 10. The council, as we have seen, elect the mayor and the aldermen, and it also appoints the clerk, treasurer, and other corporate officers. The corporate body acts by and through the council, who have the authority of the old corporations, except as modified. Provision is made for the stated and special meetings of the council; the notice prescribed, the quorum fixed, the presiding officer defined, &c. Power is given to make *by-laws*, and the *powers* of the council defined, and provision is made for powers vested in trustees, under sundry local acts of parliament, for paving, lighting, supplying with water or gas, cleansing, watching, regulating, or improving, or for providing or maintaining a cemetery or market in the boroughs being transferred to the body corporate of the borough. (Sec. 75, 20 and 21 Vict. chap. i.) By other acts of parliament the boundaries of boroughs are fixed (6 and 7 Wm. IV. chap. ciii. 1836); the "administration of the borough fund" regulated (*ib.* chap. civ.); "the administration of justice" provided for (*ib.* chap. cv.; 13 and 14 Vict. chap. xci.); borough rates regulated (7 Wm. IV. and 1 Vict. chap. lxxxi. 1837; 2 and 3 Vict. chap.

xxviii.; 3 and 4 Vict. chap. xxviii.; 4 and 5 Vict. chap. xlviii.; 5 and 6 Vict. chap. xcvi.ii.); power to sell and mortgage property and to charge rates given (5 and 6 Vict. chap. xcvi.ii.; 23 and 24 Vict. chap. xvi.); provision made as to maintaining bridges (13 and 14 Vict. chap. lxiv. 1850); to promote public libraries (18 and 19 Vict. chap. lxx. 1855; 29 and 30 Vict. chap. xciv.); in relation to the police, 19 and 20 Vict. chap. lxix. (27 and 28 Vict. chap. lxiv.; 23 and 29 Vict. chap. xxxv.); the management of highways, by enabling councils to adopt parish roads and apply their funds to their repair (25 and 26 Vict. chap. lxi.); for safe keeping of petroleum (25 and 26 Vict. chap. lxvi.); for the protection of gardens and ornamental grounds (26 and 27 Vict. chap. xiii.); in relation to prisons (28 and 29 Vict. chap. cxvii. known as "The Prisons Act, 1865"; 29 and 30 Vict. chap. c.); the Ballot Act and Corrupt Practices Act of 1872; the Municipal Elections Act of 1875; the Registration Act of 1878; the Town Council and Local Boards Act 1880. A variety of other statutes, of less importance, in relation to municipal corporations, have been passed since the general Act of 1835, some amendatory of it and some making new and additional provisions, and all have been consolidated, as before stated, in the Municipal Corporations Act of 1882, 45 and 46 Vict. chap. l.; L. R. 18 Stats. 205. By the famous Disraeli reform bill of 1867, the right to vote for a member, or members, to serve in parliament for boroughs was extended to large numbers or classes of persons who did not before possess the franchise. New American Cyclopædia, 1868, p. 327. *Ante*, chap. i. sec. 8.



law of corporations of this country is, that here all corporations, public and private, exist and can *exist only by virtue of express legislative enactment*, creating, or authorizing the creation or existence of the corporate body. Legislative sanction is with us absolutely essential to lawful corporate existence. The public welfare is the ground of this doctrine. It would be unwise to allow corporate powers to be assumed and exercised except for purposes and on terms previously defined by the legislature. That a corporation may here *exist by prescription*, and its existence be established by long and undisputed user of corporate powers, may (as the cases hereafter referred to will show) be true, but such prescription and user suppose a legislative grant. Instances of prescriptive corporations, with us, are rare and exceptional. But corporations, public and private, by virtue of direct legislative authorization under special or general laws, are being created in such vast numbers as to constitute one of the most marked and important features of the polity of the present time. Speaking of "corporations by statute," in England, Mr. Willcock says that "the legislature has not often exercised the power of creating municipal corporations, because it has been esteemed a flower of the prerogative."<sup>1</sup> This has reference to a period anterior to the famous Municipal Corporations Act of September 9, 1835 (5 and 6 Wm. IV. ch. lxxvi.), by which parliament undertook the regulation of this important subject;<sup>2</sup> and to the Companies Acts of a later date which liberally authorize the formation of companies for private enterprises with the powers and privileges of corporations.<sup>3</sup>

<sup>1</sup> Wille. on Munic. Corp. 25.

<sup>2</sup> *Ante*, secs. 8, 35.

<sup>3</sup> *Existing Municipal Government in Great Britain*—"In the recent progress of Great Britain," says Mr. Shaw (*Political Science Quarterly*, vol. iv. p. 197, June 1889), "few things are more remarkable than the development of urban life and municipal institutions. It is true that the towns and their constitutions must be studied historically in order to be thoroughly understood; but it happens that as a rule the historic towns are no longer the important ones, and that the greater municipalities of England are quite as distinctively nineteenth century developments as are those of America. As corporations, Manchester and Birmingham are only fifty years old, having procured their charters in 1838. Sheffield, Bradford, Salford, and many other large

towns, are of still more recent incorporation. And not a few of those whose charters are of earlier date, as Liverpool, Leeds, and Nottingham, are just as essentially modern, their earlier municipal history having little or no importance. There are now 284 incorporated towns and cities in England and Wales, and 106 of these have received their charters since the Municipal Reform Act of 1835. The new manufacturing towns are decidedly more populous than the old seaports and county capitals. Thus I find that of towns having a population of 25,000 or more there are nearly sixty which have been incorporated since 1825, while there are only about forty-five whose charters are of earlier date. One-half of the more recent corporations have the above-named minimum of population, while only one-fourth of the older places have it.

§ 37 a. **Number and frequency of Corporate Creations.**—The *existing law of corporations* is essentially of modern growth, and is yet in a state of development. Having occasion to refer to this

"So far then as the great modern towns owe their forms of government to the past, it is to the general past of municipal institutions in England rather than to anything of a determining kind in their own individual histories. The Municipal Corporations Reform Act of 1835 preserved the old government of towns by a mayor, aldermen, and councillors, while throwing open the franchise to the new classes of electors who had received the borough parliamentary franchise in the reform of 1832, and making the councillors directly representative of the burgesses. Since 1835, the framework of English municipal government has been simple, definite, regular, and easily understood; and the new fabrics have been elaborated upon that framework."

*Practical workings of the English system contrasted with those of the American system.*—The writer last quoted (*Ib.* pp. 216, 217), thus contrasts the theory and workings of the English system with those of our American municipalities: "Many earnest and intelligent municipal reformers, especially in New York and the Eastern States, have advocated the plan of greatly increasing the authority of the mayor, so that he may be held more definitely responsible for the administration of the various executive departments. It is the plan of a periodically elective dictatorship. As a remedy for the evils that grow out of interferences by the State and the farming out of certain departments such as parks or water-supply to special boards or commissions not responsible to the mayor or the council or the people, and further as a temporary measure of defence against untrustworthy and corrupt counsels, this somewhat heroic plan of making the mayor a dictator, or to use the Cromwellian euphemism, 'a protector,' seems to have a great deal in its favor. But it is unrepugnant, and it does not at all solve the difficult problem of harmonizing the authority of the mayor and the authority of the council. The relation between the two cannot at best be other

than that of a shifting, unprofitable, and illogical compromise.

"It would seem a little strange that the one school of reformers should not have been opposed by another which would advocate the concentration of authority and responsibility in the council. Logically, the mayor must eventually swallow the council or the council must swallow the mayor, if political forces are to be accorded some degree of natural play; and the one-man power is on the decline everywhere in this age. Municipal governments, elsewhere than in the United States, after having constituted a ruling body do not erect a separate one-man power and give it the means to obstruct the ruling, administrative body and to diminish its scope and responsibility. The mayor elsewhere is an integral part of the council. English, Scotch and Irish municipal government is simply government by a group of men who are to be regarded as a grand committee of the corporation,—the corporation consisting of the whole body of burgesses or qualified citizens. In Glasgow it is a committee of fifty; in Edinburgh, of forty-one; in Manchester, of seventy-six; in Birmingham, Liverpool and most of the large English towns, of sixty-four; in Dublin, of sixty; in Belfast, of forty; and in the other incorporated towns of the United Kingdom it varies from twelve to sixty-four, according to their size. So far as these bodies have authority to pass by-laws at all, their authority is complete, and nobody obtrudes a veto. They appoint and remove all officials. They have entire charge of municipal administration, distributing the work of departmental management and supervision to standing committees of their own number, which they organize and constitute as they please. If such a local government cannot be trusted, the fault is with popular institutions. It is quite certain to be as good a government as the people concerned deserve to have. The location of responsibility is perfectly definite. When the Glasgow city improvement scheme became unpopular with the

subject, a distinguished judge said: "Formerly but few private corporations were created, and these cut so small a comparative figure in the destinies of states, that they attracted but little attention on the part of law-makers, and were but little studied by the courts. Even in England, until a very recent period, both public and private corporations were created by royal prerogative, without the intervention of parliament, and were invested with such powers and privileges as favorites might ask, or the public good be supposed to require. But even then such corporations were rare. Now they have become among the greatest means of state and national prosperity. It is probably true that more corporations were created by the legislature of Illinois, at its last session, than existed in the whole civilized world at the commencement of the present century."<sup>1</sup> This state of things has necessarily led to a more careful study of the whole subject, both by legislators and the courts. Not only are commercial or business corporations being thus multiplied, but public and municipal corporations, in all of the States and Territories of the United States, are constantly created and universally adopted as part of the ordinary machinery of government, so that it is perhaps impossible to find a town or city of any considerable size not incorporated and invested with the power of local government. There are in this country many hundreds of incorporated places acting under special charters granted by the States or general incorporation acts passed by them.

§ 38 (18). **Congress may create.** — The *power of Congress to create or authorize the creation of corporations*, public or private, whenever these become an appropriate means of exercising any of the constitutional powers of the general government, or of facilitating its lawful operations in the States or Territories, must be taken to be conclusively settled by the Supreme Court.<sup>2</sup> This power has

voters because it was proving more expensive than its projectors had promised, the chairman of the committee was retired by his constituents at the end of his term. The taxpayers hold every member of council responsible for his votes. The system is as simple, logical, and effective as the American system is complicated and incompatible with harmonious and responsible administration. City government in America defeats its own ends by its 'checks and balances,' its partitions of duty and responsibility, and its grand opportunities for the game of hide-and-seek. Infinitely superior is the English

system, by which the people give the entire management of their affairs to a big committee of their own number, which they renew from time to time."

<sup>1</sup> *Per Caton, J., Railroad Co. v. Dalby*, 19 Ill. 353 (1857). See also similar observations of *Rogers, J.*, in *Bushell v. Insurance Co.*, 15 Serg. & Rawle (Pa.), 176, 177.

<sup>2</sup> *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of U. S.*, 9 Wheat. 738; *Thompson v. Pacific Railroad Co.*, 9 Wall. 579; *Pacific Railroad v. Lincoln Co.*, 1 Dillon, C. C. 314 (1871); *Morawetz on Corp.* (2d ed.) sec. 9.

been exercised on important occasions, such as incorporating the banks of the United States, the national banks, and the various Pacific railroad companies; and, within the above limitations, it is no longer disputed. Congress habitually passes acts for the organization of Territorial governments, the local legislatures of which may, under congressional authority, create corporations, public and private, in the Territories; but it is not within the power of Congress to establish municipal corporations within the limits of the States, and it has never attempted to exercise it.

A provision in a *Territorial Organic Act*, that the power of the territorial legislature "shall extend to all *rightful subjects of legislation*," authorizes the legislature to create municipal corporations; and to invest them with the power to make ordinances, and to provide corporation courts in which to enforce them. And such courts may be provided, although by the organic act it is declared that the *judicial power* of the Territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace.<sup>1</sup>

§ 39 (19). **Outline of ordinary Municipal Charter.** — In this country, until comparatively a recent period, municipal corporations *have been created singly, each with its special or separate charter* passed by the legislature of the State. These *charters*, in all of the States, were framed after the same general model; but in the extent

<sup>1</sup> *State v. Young*, 3 Kan. 445 (1866); *People, ex rel. v. City of Butte*, 4 Mont. 174; *Burnes v. Atchison*, 2 Kan. 454; s. p. *Reddick v. Amelia*, 1 Mo. 5 (1821). In this case the objection made was, that such a legislature was not sovereign, and that nothing short of sovereign power could create a corporation. The answer given was, that Congress could give, and had given, the power to legislate on such subjects. That a Territorial legislature, vested with general legislative powers, may create a corporation which is not affected by the subsequent adoption of a State constitution, was held in *Vincennes University v. Indiana*, 14 How. 268 (1852). See also *Vance v. Bank*, 1 Blackf. (Ind.) 80; *Myers v. Bank*, 20 Ohio, 283. Under the Territorial organic act of Colorado, the legislative assembly has power to establish a municipal corporation, but the question of such establishment by special or general law is not discussed. *Deitz v. City of Central*, 1 Col. 323 (1872). Under the same organic act it was decided that the

legislative assembly had no power to confer upon a justice of the peace a denomination not warranted by the organic act; and, in so far as a municipal charter undertook to confer upon a justice of the peace exercising jurisdiction under the ordinances of the city the name of "police magistrate," it is void. *Id.*

It is now provided by act of Congress, "That the legislative assemblies of the several Territories of the United States shall not, after the passage of this act, grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits." Act of March 2, 1867, 14 Stats. at Large, 426, sec. 1; Rev. Stats. of U. S. sec. 1889. In *Seattle v. Tyler*, Wash. Territory, 1877, this section was held by Ch. J. *Lewis* of Washington Territory to extend to and embrace municipal corporations within its prohibition.

of the special powers conferred, and in the peculiar constitution of the governing body, and the like, there was great variety. It will be useful to *notice the outline features of one of these charters*, since it constitutes the organic act of the corporation, and bestows upon it its legal character. Such a charter usually sets out with an incorporating clause declaring "that *the inhabitants* of the town of (naming it), or city of (naming it), are hereby constituted a body politic and corporate by the *name* of the 'town of —,' or 'city of —,' and by that name shall have perpetual succession, may use a common seal, sue and be sued, purchase, hold, and sell property," &c.<sup>1</sup> The charter then defines *the territorial boundaries* of the town or city thus incorporated.<sup>2</sup> After that follow provisions relating to *the governing body* of the corporation, usually styled the *town or city council*.<sup>3</sup> This is generally composed of one body, though in some instances of two; the members being called aldermen, councilmen, or trustees. The corporate territory is divided into *wards*, and each ward elects one or more aldermen, the number being specified and definite.<sup>4</sup> The charter fixes the *qualifications of the voters*, which are usually that the voter shall be a male citizen of the United States and of the State, be of age, and a resident, for a specified time, within the limits of the corporation. The *mode of holding elections* is prescribed; and the power is often given to the council to canvass returns, and to settle disputed elections to corporate offices.<sup>5</sup> Provision is made for the *election of a mayor*, or other chief executive officer of the corporation, and his duties defined. The *charter contains a minute and detailed enumeration of the powers of the city council*, which are usually numerous;<sup>6</sup> the most important of which are, the authority to create debts (sometimes restricted); to levy and collect taxes within the corporation, for corporate purposes;<sup>7</sup> to make local improvements, and assessments to pay therefor; to appoint corporate officers;<sup>8</sup> to enact ordinances to preserve the health of the inhabitants, to prevent and abate nuisances, to prevent fires, to establish and regulate markets, to regulate and license given occupations, to establish a police force; to punish offenders against ordinances; to open and grade and improve streets;<sup>9</sup> to hold corporation courts,<sup>10</sup> &c.

<sup>1</sup> *Post*, chap. viii.

<sup>2</sup> *Post*, chap. viii.

<sup>3</sup> *Post*, chap. x.

<sup>4</sup> Constitutional provisions to secure equality of representation held applicable to municipal corporations and to disable the legislature to divide a city into *wards*, in some of which a voter should have

several times as much power as a voter in another. *People v. Canaday*, 73 N. C. 198 (1875); s. c. 21 Am. Rep. 465.

<sup>5</sup> *Post*, chap. ix.

<sup>6</sup> *Post*, chaps. v. and vi.

<sup>7</sup> *Post*, chap. xix.

<sup>8</sup> *Post*, chap. ix.

<sup>9</sup> *Post*, chap. xii.      <sup>10</sup> *Post*, chap. xiii.

When it is remembered that *the charter of such a corporation is its constitution*, and gives to it all the powers it possesses (unless other statutes are applicable to it), its careful study, in any given case, is indispensable to an understanding of the nature and extent of the powers it confers, the duties it enjoins, and liabilities it creates. The construction of its various provisions, and the determination of the relation which these bear to the general statutes of the State, — how far the charter controls, or how far it is controlled by other legislation, are often among the most difficult problems which perplex the lawyer and the judge. The study of a question of corporation law begins with the charter; but it must oftentimes be pursued into the constitution, the general statutes and legislative policy of the State, and after this into the broad field of general jurisprudence.

§ 40. **Corporators and Members.** — In *municipal and public corporations*, as cities, towns, parishes, school-districts, and the like, membership, so to speak, is, under the legislation and polity of this country, usually constituted by living within certain limits, whatever may be the desire of the individual thus residing or that of the municipal or other incorporated body. In *private corporations*, on the other hand, especially those organized for pecuniary profit, membership is constituted by subscribing to or receiving, with the assent of the corporation when that is necessary, transfers of its stock.<sup>1</sup> It is the citizens or inhabitants of a city, not the common council or local legislature, who constitute the "corporation" of the city. The members of the council and other charter officers are the agents or ministers of the corporation.<sup>2</sup>

§ 41 (20). **General municipal Incorporating Acts in the United States.** — Within a period comparatively recent, the legislatures of a number of the States, following in this respect the example of the English Municipal Corporations Act of 5 and 6 Wm. IV. ch. lxxvi., heretofore mentioned, have passed *general acts respecting municipal corporations*. These acts abolish all special charters, or all with enumerated exceptions, and *enact general provisions for the incorporation, regulation, and government* of municipal corporations. The usual scheme is to grade corporations into classes, according to their size, as into Cities of the First class, Cities of the Second Class,

<sup>1</sup> Overseers of Poor, &c. v. Sears, 22 Pick. 122, 130, *per Shaw*, C. J.; Oakes v. Hill, 10 Pick. 333, 346, *per Morton*, J.; *ante*, sec. 9, and notes.

<sup>2</sup> *Ante*, sec. 21; Lowber v. Mayor, &c. of N. Y., 5 Abbott's Pr. R. 325; Clarke v. Rochester, 24 Barb. 446 (1857); Baumgartner v. Hasty, 100 Ind. 575.

and Towns or Villages, and to bestow upon each class such powers as the legislature deems expedient; but the powers and mode of organization of corporations of each class are uniform.<sup>1</sup>

<sup>1</sup> *Ohio*.—By the Towns, Cities, and Villages' Act of May 3, 1852 (Swan's Stat. 954), all corporations existing for the purposes of municipal government are thereby organized into *cities* and *incorporated villages*. (Sec. 1.) In respect to the exercise of certain corporate powers, municipal corporations are divided into classes, thus: 1. Cities of the first class, which comprise all cities having a population exceeding twenty thousand inhabitants; 2. Cities of the second class, which comprise all cities not embraced in the first class; 3. Incorporated villages; and 4. Incorporated villages for special purposes. *Ib.* sec. 39 *et seq.* These are "declared to be bodies politic and corporate, under the name and style of the city of —, or the incorporated village of —, as the case may be,—capable to sue and be sued; to contract and be contracted with; to acquire, hold, and possess property, real and personal; to have a common seal; and to exercise such other powers, and to have such other privileges, as are incident to municipal corporations of like character or degree, not inconsistent with this act or the general laws of the State." *Ib.* sec. 18. These powers and privileges are then specified with great minuteness, twenty sections of the act being devoted to this purpose. Incorporated villages are governed by one mayor, one recorder, and five trustees, elected annually; the mayor, recorder, and trustees constituting the village council, any five of whom make a quorum. *Ib.* sec. 43. The corporate authority of cities is vested in the mayor, one board of trustees (two from each ward), who compose the city council, together with such officers as are mentioned in the act, or as may be created under its authority. *Ib.* sec. 52 *et seq.*

"The governing all cities and villages under one general law was a new experiment, supposed to be required by the present Constitution. It was to be expected that, in the working of the experiment, omissions, if not mistakes, would be discovered, to be corrected by addi-

tional legislation. It will be a work of care and time to perfect an orderly and harmonious system." *Per Gholson, J.*, in *Thomas v. Ashland*, 12 Ohio St. 124, 130 (1861). *Infra*, sec. 46.

*California*.—Constitution, Art. XI, on Cities, Counties, and Towns, contains provisions as to their incorporation, organization, and government. The entire subject of the creation and government of cities is provided for in Part IV. title iii. of the Political Code. It does not apply to cities existing at the time of its adoption. *Ex parte Simpson*, 47 Cal. 127; *People v. Clunie*, 70 Cal. 504. If the course pursued in establishing a municipality is substantially such as is pointed out in the act, courts will not disturb it, the propriety of establishing a municipality, and of including particular territory within its boundaries, being a political question for the legislature to determine. *People v. City of Riverside*, 70 Cal. 461.

*Illinois*.—The General Assembly has the power to delegate legislative authority incident to municipal government to cities; but this can only be done by *general law*, under the Constitution of 1870. When, however, it is done by such law, the constitutional mandate is fully complied with, and the ordinances to be adopted by different municipalities, under the power so conferred, may be as variant in their terms as the varying municipal necessities or sense of public policy in those who exercise the legislative authority may require. *Covington v. East St. Louis*, 78 Ill. 548 (1875).

*Iowa*.—The Ohio act is, in substance, adopted in Iowa. Revision 1860, chap. li. But it does not apply to cities having special charters, unless adopted by them. *Burke v. Jeffries*, 20 Iowa, 145.

*Kansas*.—The act of *Kansas* (Comp. Laws 1885, chaps. 18, 19, 20) provides for three classes of cities, and is in other respects similar to that of Ohio. It has been decided in that State that a supplemental act by which it was intended to extend corporate powers, but which was so

These acts are generally held not to violate constitutional provisions against local or special legislation.<sup>1</sup> *General incorporation*

special in its provisions that it could by no possibility apply to more than three certain cities, was void, as being in violation of the State Constitution forbidding the legislature from conferring corporate powers by *special act*. *Topeka v. Gillett*, 32 Kan. 431.

In *Tennessee* (Acts 1849, chap. xvii.) provision is made by general act for the incorporation of towns, cities, and villages. The constitution of Tennessee declares that "the legislature shall have power to grant charters of incorporation as they may deem expedient for the public good." Art. XI. sec. 7. In the *State v. Armstrong*, 3 Sneed (Tenn.), 634, it was held that the act of 1856, by which full power to create corporations, and determine the extent of their powers, was given to the Circuit Courts, was unconstitutional, on the ground that the legislature could not delegate its authority to the courts. But in the *Mayor, &c. v. Shelton*, 1 Head, 24 (1858), it was held that the act of 1849 — which was a general statute for the incorporation of towns and cities, and by which a petition was to be presented by the inhabitants of a place proposing to organize under the act to the County Court, which had power simply to record the petition and designate the boundaries of the corporation — was not in conflict with the Constitution, as the statute, and not the court, determined the extent and nature of the powers of the corporation. In *Ex parte Chadwell*, 3 Bax. 98, s. c. 1 Tenn. Ch. 95, and *Ex parte Burns*, 1 Tenn. Ch. 83, the act of 1871, under the Constitution of 1870, was declared void in so far as it undertook to confer upon the Court of Chancery the power to grant corporate franchises. See also *Willett v. Bellville*, 11 Lea (Tenn.), 1. For abstract of legis-

lation in this State establishing *Taxing Districts*, see *post*, ch. vii.

*Missouri*. — A general act for the incorporation of towns was passed in Missouri in 1845, and it was held not unconstitutional by reason of certain duties which it imposes on the County Court with reference to organization of towns under the act, as these duties are not legislative but judicial, and the law itself, and not the court, declares the powers of which the corporation shall be possessed. *Kayser v. Trustees, &c.* 16 Mo. 88 (1852). Construction of statute. *Woods v. Henry*, 55 Mo. 560; *State v. McReynolds*, 61 Mo. 203 (1876). The case of *Kayser v. Trustees, &c. supra*, is thought by *Campbell, J.*, to conflict with the general course of decision, since such duties are in their nature administrative or political rather than judicial. *People v. Bennett*, 29 Mich. 451; s. c. 18 Am. Rep. 107. See *Damodhar Gordhani v. Deoran Kanji*, L. R. 1 App. Div. 332.

*Indiana*. — The general law of 1857, for the incorporation of cities, is not unconstitutional for want of *uniformity* in the mode of their organization. *Lafayette v. Jenners*, 10 Ind. 70, 80 (1857). See also *Welker v. Potter*, 18 Ohio St. 85. In the Revised Statutes of 1881, secs. 3031-3406 are collected the statutory law of the State relating to cities and towns, their organization, powers, methods of taxation, opening of streets, &c. In an election held under its provisions to determine whether a town shall become a city, a *majority of the votes cast* is sufficient to decide; it is not essential that there be a majority of the legal voters. *State v. Tipton*, 109 Ind. 73.

The Supreme Court of Indiana, in the recent cases (April, 1889) of the *State v.*

<sup>1</sup> *State v. Graham*, 16 Neb. 74; *Pritchett v. Stanislaus Co.*, 73 Cal. 310. An act known as the "McClure charter," held not to be a "general law" for the incorporation of cities under the Constitution of California. *Desmond v. Dunn*, 55 Cal. 242; *Ex parte Wells*, 21 Fla. 280.

A constitutional provision authorizing cities having over 100,000 inhabitants to frame charters for their own government held to be self-acting and not to require legislation to give it effect. *People v. Hoge*, 55 Cal. 612.



*acts, rather than special charters*, would seem clearly to be the best method of creating and organizing municipal corporations. 1. Such

Denny, 21 Northeast. Rep. 252, and Evansville v. State, 21 Northeast. Rep. 267, has asserted and maintained the *constitutional right* of local self-government in that State in opinions of marked ability and learning. *Post*, sec. 58.

*Pennsylvania.*—A general act was passed in 1851, designed to form a system for the regulation of boroughs incorporated *thereafter*. Commonwealth v. Montrose, 52 Pa. St. 391. Course of legislation and decision in Pennsylvania as to the incorporation of boroughs discussed in People v. Bennett, *supra*. A general act for the incorporation and regulation of municipal corporations, dividing them into three classes, and having other features similar to the Ohio act, was adopted in this State May 3, 1874. It has since been amended. Reading v. Savage, 120 Pa. St. 198 (1888).

*North Carolina.*—By general act, every incorporated town may elect, each year, not less than three nor more than seven commissioners, who are a body corporate and the governing body of the town. These commissioners are elected by the vote of the citizens of the place. At the same time they are also to elect a mayor, who presides at the meetings of the commissioners, but who has no vote except in case of a tie. The mayor is both a peace officer and a judicial officer, with the same jurisdiction as a justice of the peace, with power also to "hear and determine all cases that may arise upon the ordinances of the commissioners," &c. The commissioners may levy certain specified taxes, and make ordinances in relation to their officers, records, markets, nuisances, the repair of streets and bridges in the town, &c. These general provisions apply to all incorporated towns when not inconsistent with special charters or acts in reference thereto. Rev. Code 1854, chap. iii. p. 586.

*Michigan.*—The general act of 1873 for the incorporation of villages within any two square miles of territory was held unconstitutional because the rights of the people concerned were not respected, and the legislature had attempted to delegate legislative powers to private citizens in-

stead of to corporate authorities or local boards of officers. People v. Bennett, 29 Mich. 451 (1874); s. c. 18 Am. Rep. 107.

*New York.*—In this State there are cities with local and special charters, and also towns whose powers, duties, and privileges are particularly prescribed by statute. Each town is a body corporate for specified purposes; but it is declared that "no town shall possess or exercise any corporate powers except such as are enumerated in this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given." Rev. Stats. Part I. chap. xi. p. 337, secs. 1, 2. "The several towns in this State," says *Denio, J.*, in *Lorillard v. The Town of Monroe*, 11 N. Y. (1 Kern.) 392 (1854), "are corporations for certain special and very limited purposes, or, to speak more accurately, they have a certain limited corporate capacity. They may purchase and hold lands within their own limits for the use of their inhabitants. They may, as a corporation, make such contracts and hold such personal property as may be necessary to the exercise of their corporate or administrative powers, and, as a necessary incident, may sue and be sued, where the assertion of their corporate rights, or the enforcement against them of their corporate liabilities, shall require such proceedings. (1 Rev. Stats. 337, sec. 1 *et seq.*) In all other respects—for instance, in everything which concerns the administration of civil or criminal justice, the preservation of the public health and morals, the conservation of highways, roads, and bridges, the relief of the poor, and the assessment and collection of taxes—the several towns are political divisions, organized for the convenient exercise of portions of the political power of the State, and are no more corporations than the judicial, or the senate and assembly districts. *Ib.* sec. 2. The functions and duties of the several town officers respecting *these subjects* are judicial and administrative, and not in any sense corporate functions or duties," and hence, as to *such subjects*, the towns as corporations are not

acts tend to prevent favoritism and abuse in procuring extraordinary grants of special powers. 2. They secure uniformity of rule and of construction. All being created and endowed alike, real wants are the sooner felt and provided for, and real grievances the sooner redressed.<sup>1</sup>

*Creation by Implication.*

§ 42 (21). **No Precise Form of Words essential.** — It is well settled *in England* that, while a corporation must commence or be instituted by the proper authority, yet *no fixed, prescribed, or precise form of words* is necessary in order to create a corporation. While the words "to found" "to erect or establish," or "to incorporate," are commonly used to evince the intention to erect or create a body politic, they are not necessary.<sup>2</sup> The king grants a charter to the men of Dale, that they may annually elect a mayor, and plead and be impleaded by the name of the mayor and commonalty. This is considered to be sufficient to incorporate them.<sup>3</sup> So a grant by a charter containing no *direct clause of incorporation* to the inhabitants of a town, "that their town shall be a *free borough*," incorporates it.<sup>4</sup> So, also, a grant by the king to the men of Dale that they be discharged of tolls incorporates them for this particular purpose, but does not enable them to purchase.<sup>5</sup> The settled doctrine is that *a corporation may be created by implication*, as well as by the use of words. But this implication, to be sufficient, must clearly manifest or express the intention to establish or constitute a body politic or corporate, that is, to invest it with corporate powers and privileges. But the *absence of express provision respecting the incidents* which the law tacitly annexes to corporations is considered immaterial. Thus the omission in the charter or act of the words "to plead and be impleaded," or "to have a seal," or "to make by-laws," would not make it essentially defective.<sup>6</sup> So it would not be essentially de-

liable for any default or malfeasance of these officers. See, as to the corporate capacity of towns in New York, *Denton v. Jackson*, 2 Johns. Ch. R. 320; *North Hempstead v. Hempstead*, 2 Wend. 109; affirming s. c. *Hopk.* 288; *Cornell v. Guilford*, 1 Denio, 510.

*Arkansas.* — *State v. Jennings*, 27 Ark. 419 (1872). The legislature cannot delegate the power to create municipal corporations, — as, in this case, to a district court. *State v. Simons*, 32 Minn. 540; *State v. Leatherman*, 38 Ark. 81.

<sup>1</sup> *Cairo v. Bross*, 101 Ill. 475 (1882), quoting text. *Post*, sec. 46, and note.

<sup>2</sup> 10 Co. 27a, 28a, 29b, 30; 1 Kyd, 62; 2 Kent, Com. 27.

<sup>3</sup> 21 Edw. IV. 56. The doctrine of a corporation by implication originated in the time of Edward IV. *Ib.* 8 Edw. IV. 28. *Post*, sec. 560.

<sup>4</sup> Kyd, 62, cites *Firm. Burg.* ch. ii.; *Madox, Hist. Exch.* 402.

<sup>5</sup> *Vin. Abr. Corp. F.* pl. 6; *Ib.* pl. 4; *Bagot's Case*, 7 Edw. IV. 29; *Grant on Corp.* 43, note c, and cases cited.

<sup>6</sup> *Rol. Abr.* 513; 1 Kyd, 63. The *Conservators, &c. v. Ash*, 10 Barn. & Cress. 349 (21 Eng. C. L. 97), 1829. "It is not necessary," says Mr. Kyd, "that the

fective were *the name omitted*, if the name could be ascertained from the terms of the charter or act, or from the nature of the thing or matters granted.<sup>1</sup> Certain attributes or powers are absolutely essential to constitute a body corporate, such as perpetual succession, the right to contract, to sue and be sued as a corporation, &c. Now if the charter or act which is relied upon as creating a body corporate by implication, instead of simply *omitting* to express these essential properties, negatives and excludes them, it is plain that the body would not be deemed to be incorporated.<sup>2</sup>

§ 43 (22). **Same subject.** — Although corporations *in this country* are created by statute, still the rule is here also settled that not only private corporations aggregate, but municipal or public corporations, *may be established without any particular form of words* or technical mode of expression, though such words are commonly employed.<sup>3</sup> If powers and privileges are conferred upon a body of men, or upon the residents or inhabitants of a town or district, and if these cannot be exercised and enjoyed, and if the purposes intended cannot be carried into effect, without acting in a corporate capacity, a corporation is, to this extent, created by implication. The question turns upon the intent of the legislature, and this can be shown constructively as well as expressly.<sup>4</sup> This is well illustrated in a case in Massachusetts,<sup>5</sup> where the question was whether the plain-

charter should *expressly* confer those powers without which a collective body of men cannot be a corporation, such as the power of suing and being sued, and to take and grant property, though such powers are in general expressly given."

1 Kyd, Corp. 63. Thus, in the case of the *Borough of Yarmouth*, 1609, 2 Brownlow & Goldsb. 292, Part II., it was decided by the common bench, *per* Lord Coke, that a grant of incorporation to the burgesses or citizens of a borough or city, which, being an old grant, should be favorably construed, was good without the words "their successors." And see, on this subject, the learned opinion of *Shaw*, C. J., in *Overseers of Poor, &c. v. Sears*, 22 Pick. 122, 130 (1839). He says: "The mode of perpetuating the existence of a corporate body is not essential; all that is essential is that some mode be provided by the charter or act by which it is constituted, or by the general laws of the government, by means of which it shall be so perpetuated." 22 Pick. 130; *The Conservators v. Ash*, 10

Barn. & Cress. 349 (21 Eng. C. L. 97). *Ante*, sec. 32; *post*, sec. 84.

<sup>1</sup> *Trustees v. Parks*, 10 Me. (1 Fairf.) 441; *School Com. v. Dean*, 2 Stew. & Port. (Ala.) 190 (1832).

<sup>2</sup> *Grant on Corp.* 80.

<sup>3</sup> *Thomas v. Dakin*, 22 Wend. 9, 84, *per* Cowen, J., and authorities cited; *Bow v. Allentown*, 34 N. H. 351, 372; *Stebbins v. Jennings*, 10 Pick. 172; *Benton v. Jackson*, 2 Johns. Ch. 325, 326 (1817); *Mahoney v. The Bank of the State*, 4 Ark. 620 (1842); s. c. well digested in *Angell & Ames on Corp.*, sec. 77; *North Hempstead v. Hempstead*, 2 Wend. 109, 133, opinion by *Savage*, C. J.; *Conservators of River Tone v. Ash*, 10 Barn. & Cress. 349; *Jefferys v. Gurr*, 2 B. & Adol. 841; *Newport Trustees, In re*, 16 Sim. 346; 2 Kent, Com. 27.

<sup>4</sup> Same cases last cited.

<sup>5</sup> *Inhabitants, &c. v. Wood*, 13 Mass. 193 (1816). Mr. Fessenden for the plaintiff, and Mr. Greenleaf for the defendant. In *Bow v. Allentown*, 34 N. H. 351, it was

tiffs were a corporate body with power to sue. They were not incorporated expressly. But, by statute, the inhabitants of the several school-districts were empowered, at any meeting properly called, to raise money to erect, repair, or purchase a school-house, to determine its site, &c., the majority binding the minority. The cause was argued by able counsel, and, after several consultations, the judges of the Supreme Judicial Court finally agreed in the opinion that the plaintiffs possessed sufficient corporate powers to maintain an action on a contract to build a school-house, and to make to them a lease of land. But the *intention* of the legislature, where it is sought to show that a corporation has been created by implication, must satisfactorily appear.<sup>1</sup>

§ 43 a. **Corporate Existence not open to Collateral Attack.**—

Where a municipal corporation is acting under color of law, and its existence is not questioned by the State, it *cannot be collaterally drawn in question* by private parties; and the rule is not different although the Constitution may prescribe the manner of incorporation.<sup>2</sup>

held that the annexation by the legislature of other territory to the town of Allentown made that a corporate town by *implication*, if it was not so before; and such also was the effect, under the Constitution of New Hampshire, of a grant to a place having less than one hundred and fifty polls to send a representative. A legislative grant gives capacity to hold the thing granted. *Lord v. Bigelow*, 6 Vt. 465.

<sup>1</sup> *Medical Institute v. Patterson*, 1 Denio, 61; s. c. affirmed in Court of Errors, 5 Denio, 618 (1846); *Myers v. Irwin*, 2 Serg. & Rawle, 368 (1816); *Angell & Ames*, sec. 79, and cases cited; *Wells v. Burbank*, 17 N. H. 393; *Society, &c. v. Town of Pawlet*, 4 Pet. (U. S.) 480, 502. To establish a corporation by implication, says *Shaw, C. J.*, in *Stebbins v. Jennings*, 10 Pick. 172, it must appear that the rights and powers conferred can only be enjoyed by the exercise of corporate powers, and, therefore, if such powers are not necessary, they are not impliedly given.

<sup>2</sup> *St. Louis v. Shields*, 62 Mo. 247 (1876); *Cooley*, Const. Lim. 180, 254. Hence in an action by such a corporation

to recover penalties imposed by its ordinances, *nul tiel* corporation is not a good plea. *Mendota v. Thompson*, 20 Ill. 197; *Hamilton v. Carthage*, 24 Ill. 22; *Kettering v. Jacksonville*, 50 Ill. 39; *Geneva v. Cole* (action to recover tax), 61 Ill. 397 (1871); *Burt v. Winona & St. Peter Ry. Co.*, 31 Minn. 472; *Fredericktown v. Fox*, 84 Mo. 59; *Austrian v. Guy*, 21 Fed. Rep. 500.

In *State v. Leatherman*, 38 Ark. 81, *Eakin, J.*, said: "We are emboldened to declare in behalf of the public good, that the State herself may, by long acquiescence, and by the continued recognition through her officers, State and county, of a municipal corporation, be precluded from an information to deprive it of franchises long exercised in accordance with the general law." In this case the proceedings to incorporate the city were had in a court not empowered to entertain them. *People v. Maynard*, 15 Mich. 463, 470. See *post*, chap. xxi., *Quo Warranto*. Entering into an obligation with a corporation admits the corporate capacity, and precludes a plea of *nul tiel* corporation. *St. Louis v. Shields*, 62 Mo. 247, 251, and cases cited. *Post*, sec. 449.

### *Acceptance of Charter.*

§ 44 (23). **Incorporating Act may be made binding without Consent, or only upon Consent.** — The rule which applies to private corporations, that the incorporating act is ineffectual to constitute a corporate body until it is *assented to or accepted* by the corporations,<sup>1</sup> has no application to statutes creating municipal corporations.<sup>2</sup> These are laws, and as such are imperative and binding according to their terms without any consent, unless the act is expressly made conditional.<sup>3</sup> All who live within the limits of the incorporated district are bound by them, and can withdraw from their operation only by removal. Over such corporations the legislature, except as restrained by the Constitution, has entire control; and unless otherwise provided by the act itself, or a different intention be manifested, the public corporation is legally constituted as soon as the incorporating act declaring it to exist goes into effect.<sup>4</sup> But while the legislature is not bound to obtain the acceptance or assent of the municipal corporation, it is well established that a provision in a municipal charter that it shall not take effect unless assented to or accepted by a majority of the inhabitants, is not unconstitutional, it being in no just sense a delegation of legislative power, but merely a question as to the acceptance or rejection of a charter.<sup>4</sup> So a provision in a charter, or the constituent act

<sup>1</sup> *Post*, secs. 54, 84, note, 183.

<sup>2</sup> It is competent for the legislature to make the acceptance or rejection of a charter dependent upon the result of an election by the qualified voters of the territory to be affected by it. *Clarke v. Rogers*, 81 Ky. 43.

<sup>3</sup> *Berlin v. Gorham*, 34 N. H. 266 (1856), *per Bell, J.*, where it is accordingly held that to make an incorporation of a town effectual it is not necessary that there should be a legal town meeting holden in it. See also *People v. Wren*, 4 Scam. (5 Ill.) 269; *Warren v. Charlestown*, 2 Gray, 104; *Mills v. Williams*, 11 Ire. 558; *State v. Curran*, 7 Eng. (12 Ark.) 321; *Fire Department v. Kip*, 10 Wend. 267; *People v. Morris*, 13 Wend. 325, 337; *Brouwer v. Appleby*, 1 Sandf. 158 (1847); *People v. President*, 9 Wend. 351; *Wood v. Bank*, 9 Cow. 194, 205 (1828); *Proprietors, &c. v. Horton*, 6 Hill, 501; *Gorham v. Springfield*, 21 Maine, 58 (1842); *People v. Stout*, 23 Barb. 349 (1856); *Bristol v. New Chester*, 3 N. H.

524, 532 (1826); *State v. Canterbury*, 8 Fost. (28 N. H.) 218; *People v. City of Butte*, 4 Mont. 174. Acceptance, when requisite, may doubtless be *implied* in proper cases, as where no particular mode of expressing acceptance is prescribed, from corporate acts and conduct, as in cases of private corporations. *Taylor v. Newberne*, 2 Jones Eq. N. C. 141 (1855). See *Zabriskie v. Railroad Co.*, 23 How. (U. S.) 381, 397 (1859). *Post*, sec. 270, note.

<sup>4</sup> *People v. Salomon*, 51 Ill. 53 (1869); *Alcorn v. Horner*, 38 Miss. 652 (1860); *Patterson v. Society, &c.*, 4 Zab. (24 N. J. L.) 385 (1854); *Smith v. McCarthy*, 56 Pa. St. 359; *Commonwealth v. Quarter Sessions*, 8 Pa. St. 395; *Commonwealth v. Painter*, 10 Pa. St. 214; and see also *Bull v. Read*, 13 Gratt. (Va.) 78 (1853); *People v. Reynolds*, 5 Gilm. (10 Ill.) 1; *State v. Scott*, 17 Mo. 521; *Hudson Co. v. State*, 4 Zab. (24 N. J. L.) 718; *Bank v. Brown*, 26 N. Y. 467 (1863); *Call v. Chadbourne*, 46 Maine, 206; *State v. Wil-*

of a municipal corporation, by which the right to make certain improvements or to create certain liabilities is made to depend upon a vote of the people interested, has frequently been upheld as valid.<sup>1</sup> So an act directing an election to be held by the qualified electors interested to determine, by ballot, whether a newly-erected township should be continued, is constitutional.<sup>2</sup> On the same principle

cox, 45 Mo. 458; *Hobart v. Supervisors*, 17 Cal. 23; *People v. City of Butte*, *supra*; *Lafayette, &c. R. R. Co. v. Geiger*, 34 Ind. 185. This case asserts a distinction between a bill submitted to the people of the whole State for adoption or rejection, and an act which leaves it to the inhabitants of a particular locality whether they will avail themselves of its provisions. It has been held in New Hampshire that it was competent for the legislature, under the Constitution of the State, to enact a penal law which shall have effect only in those towns which adopt it by vote. *State v. Noyes*, 10 Fost. (30 N. H.) 279 (1855). An amendment to a city charter was to take effect only when adopted "by a majority of the voters of the city." This was considered to manifest the intention to present the question of acceptance to the voters at a regular city election. The council ordered the vote to be taken at the township polls; the voters of the two organizations possessing different qualifications, but the township and city occupied precisely the same territory. Held, that the election was of no validity, and that the amendment had never been duly accepted. *Foot v. Cincinnati*, 11 Ohio, 408 (1842).

*Local Option Laws.* A useful article upon the Constitutionality of *Local Option Laws* will be found in 12 Am. Law Reg. (n. s.) March, 1873, p. 129. Affirming the principle that municipal or public corporations or the people thereof may by the legislature be invested with the power to regulate or prohibit the retail of intoxicating drinks, the Supreme Court of New Jersey decided the *Chatham Local Option Law*, which declared the retail of ardent spirits without license to be unlawful, and which provided that no license should be granted if a majority of the voters of a township voted "no license," to be constitutional. *State v. Morris Common Pleas*, 12 Am. Law Reg. (n. s.) 32; s. c. 36

N. J. L. 72; s. c. 13 Am. Rep. 422. See also *Howe v. Plainfield* (intoxicating liquors), 37 N. J. L. 146; *Hudson County v. State* (power of local body to fix rates of ferriage), 4 Zab. (24 N. J. L.) 718. Validity of Local Option Laws denied, and the subject fully examined, in Wall, *In re*, 48 Cal. 279 (1874); s. c. 17 Am. Rep. 425; *People v. Nally*, 49 Cal. 478 (1875); *Anderson v. Commonwealth*, 14 Bush, 171; *State v. Cook*, 24 Minn. 247; *Fell v. State* (Liquor Law), 42 Md. 71 (1875); s. c. 20 Am. Rep. 83. See also in Pennsylvania the case which involved the question of the validity of the act of May, 1871, "to allow the voters of the 22d Ward of Philadelphia to vote on the question of granting licenses to sell intoxicating liquors." *Locke's Appeal*, 72 Pa. St. 491; s. c. 13 Am. Rep. 716; *Gloversville v. Howell* (intoxicating liquors), 70 N. Y. 287 (1877); *State v. Wilcox*, 42 Conn. 364 (1875); s. c. 19 Am. Rep. 536; *Cooley, Const. Lim.* 124, 125. *Post*, sec. 308.

<sup>1</sup> *Clarke v. Rochester*, 28 N. Y. 605; *Patterson v. Society, &c.*, 4 Zab. (24 N. J. L.) 385; *Bank of Rome v. Rome*, 18 N. Y. 38; *Trustees v. Cherry*, 8 Ohio St. 564; *Burnes v. Atchison*, 2 Kan. 454 (1864); *Bank v. Brown*, 26 N. Y. 467; *Hammond v. Haines*, 25 Md. 541; *Railroad Co. v. Commissioners*, 1 Ohio St. 77; *Foot v. Cincinnati*, 11 Ohio, 408 (1842); *St. Louis v. Alexander*, 23 Mo. 483; *Blanding v. Burr*, 13 Cal. 343. These cases are distinguishable from *Barto v. Himrod*, 4 Seld. (8 N. Y.) 483.

<sup>2</sup> *Commonwealth v. Judges, &c.*, 8 Pa. St. 391; distinguished from *Parker v. Commonwealth*, 6 Pa. St. 507; *Commonwealth v. Painter*, 10 Pa. St. 214 (1849); *Smith v. McCarthy*, 56 Pa. St. 359. So the question may be submitted whether a portion of an adjoining county shall be annexed. *People v. Nally*, 49 Cal. 478 (1875). Where the authority to act de-

the legislature may provide that a statute shall cease to exist unless the municipal corporation to be affected by it shall, within a prescribed period, assent to it.<sup>1</sup> Permitting the voters of a municipality to decide upon questions of local interest or expediency, such as those mentioned in this section and in the notes, seems to the author to be conformable to those ideas of self-government and self-regulation by the people concerned, which lie at the basis not only of our municipalities but of our institutions. The only limit is that the legislature must not delegate its function as the law-making branch of the government.

*Special Constitutional Provisions relating to Municipal Corporations.*

§ 45 (24). **Creation by special Act and by general Laws.** — The Constitutions of many of the States contain provisions respecting the creation and powers of municipal corporations. In some of the Constitutions the legislature is in terms allowed to create corporations for municipal purposes by *special act*,<sup>2</sup> and in others it is in

pend upon the prior sanction of "a majority of the qualified voters" residing in the corporation, the presumption is that all who vote are legal voters; and the better view probably is, that those who do not vote acquiesce in the result, and that a majority of those actually voting is sufficient, though in point of fact it may not be a majority of all who would be entitled to vote. *State v. Binder*, 38 Mo. 450 (1866); *State v. Mayor, &c.* 37 Mo. 270. And of this opinion is the Supreme Court of the United States, in which, in an action on municipal bonds, the phrase, "a majority of the legal voters of the township," was held to mean a majority of the legal voters of the township voting at the election. *St. Joseph Township v. Rogers*, 16 Wall. 644 (1872); *People v. Warfield*, 20 Ill. 163; *People v. Wiant*, 48 Ill. 263; *Railroad v. Davidson County*, 1 Sneed (Tenn.), 692; *Talbot v. Dent*, 9 B. Mon. 526; *Angell & Ames, Corp.*, 9 ed. secs. 499, 500. But compare *State v. Winkelmeier*, 35 Mo. 103, which construes such language to require a "majority of all the legal voters of the city, and not merely of all who might, at a particular time, choose to vote upon it." See *Damon v. Granby*, 2 Pick. 345, 355 (1824), and chapter on Corporate Meetings, *post. Infra*, secs. 47, note 277.

<sup>1</sup> *Corning v. Greene*, 23 Barb. 33 (1856).

<sup>2</sup> *Post*, chap. iv. *New York Constitution*, 1846, art. viii. sec. 1; *Illinois Constitution*, 1847, art. x. sec. 1; see, also, new *Constitution*, 1870; *Michigan Constitution*, 1850, art. xv. sec. 1; *California Constitution*, 1849, art. iv. sec. 31; construed, *Railroad Co. v. Plumas Co.*, 37 Cal. 354. The *Constitution of California* of 1879 ordains that "Corporations for municipal purposes shall not be created by special laws, but by general laws." Art. xi. sec. 6. *Minnesota Constitution*, 1857, art. x. sec. 2; *Tierney v. Dodge*, 9 Minn. 171; 12 Minn. 41; *Oregon Constitution*, 1857, art. xi. sec. 2; *Louisiana Constitution*, 1864, title vii. art. cxxi.; *Nevada Constitution*, 1864, art. viii. sec. 1; construed, *Virginia City v. Mining Co.*, 2 Nev. 86. In *Missouri* it is provided that no municipal corporation shall be created by special act, except cities of at least 5,000 inhabitants, the special act to be approved by a vote of the inhabitants. *Constitution 1865*, art. viii. sec. 5. Under a constitutional provision in *Pennsylvania*, that "the General Assembly shall not pass any local or special law regulating the affairs of counties, cities, townships," &c., it was held that an act providing that in counties the population of which exceeds 100,000 and is less

terms forbidden to do this, and required to provide a *general law* for all corporations, public and private.<sup>1</sup> So far as municipal corporations and their rights are protected by constitutional provisions, express or implied, they are removed from legislative control, but no further, as we shall see in a subsequent chapter. But the provisions of the several Constitutions in reference to municipal institutions and local government are sufficient, it is believed, to establish that the legislative power over them and their existence is not transcendental and unlimited.<sup>2</sup> Although the Constitution of a State

than 150,000, the fees that belong to certain county officers shall be turned over to another, is unconstitutional, being an attempt to legislate directly for certain counties (there being only four falling within the limits mentioned in the act) selected from all others. This is local or special legislation within the meaning of the constitutional prohibition. *McCarthy v. Commonwealth*, 110 Pa. St. 243, following previous cases in the same State to the same effect. "Wherever the provisions of an act are compulsorily binding upon every city of the particular classification, the legislation is general and constitutional. Wherever the provisions are binding at the option of the local authorities, the legislation is special, local, and unconstitutional." *Reading v. Savage*, 120 Pa. St. 198 (1888).

<sup>1</sup> *Iowa* Constitution, 1857, art. iii. sec. 30; *Von Phul v. Hammer*, 29 Iowa, 222; *Florida* Constitution, 1865, art. iv. sec. 20; *Nebraska* Constitution, art. viii. secs. 1 and 2. By the new Constitution of *Illinois*, special legislation is forbidden "incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village." *Wisconsin* constitution amendment, 1871. *Atty.-Genl. v. Railroad Co.*, 35 Wis. 425; *Kimball v. Rosendale*, 42 Wis. 407; *Stevens Point & Co. v. Reilly*, 44 Wis. 295; *Kansas* Constitution, art. xii. secs. 1 and 5; construed, *Wyandotte City v. Wood*, 5 Kan. 603; *Atchison v. Bartholow*, 4 Kan. 124. The Constitution of *Ohio* is as follows: "The General Assembly shall provide for the organization of cities and incorporated villages by *general laws*, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent

the abuse of such power." Constitution A. D. 1851, art. xiii. sec. 6. Under this section the legislature, by the Towns' and Cities' Act of May 3, 1852 (*Swan & Critchf. Stats.* 1497), undertook to provide for the government of all such places by a general statute. *Thomas v. Ashland*, 12 Ohio St. 124. An act applying to *all cities* of the first class containing less than 100,000 inhabitants is not in conflict with the provision of the Constitution which requires all laws of a general nature to have a uniform operation throughout the State. *Welker v. Potter*, 18 Ohio St. 85 (1868); see also *Lafayette v. Jenners*, 10 Ind. 70, 80, (1857). Construction of constitutional provision that there shall be "but one system of *town and county* government," which "shall be as nearly uniform as practicable." *State v. Dousman*, 28 Wis. 541 (1871); *State v. Riordan*, 24 Wis. 484 (1869).

In *Morawetz on Corp.* (2d ed.) secs. 9-13, the cases relating to constitutional limitations on the powers of the States in respect of the mode of creating corporations are referred to, and the judicial construction of special constitutional provisions on this subject stated.

<sup>2</sup> *People v. Draper*, 15 N. Y. 561, *Brown, J.*, says: "When the present Constitution was formed, the entire territory of the State was separated, and appropriated by its civil divisions, its counties, cities, and towns. These civil divisions are coeval with the government. The State has never existed a moment without them. *All our thoughts and notions of civil government are inseparably associated with counties, cities, and towns.* They are permanent elements in the frame of government; they are institutions of the State, durable and indestructible by any power



may recognize the municipal corporation of an important city by fixing the number of certain officers, and providing for their election, &c., yet this does not make the charter of the city a constitutional charter conferring powers beyond the control of the legislature.<sup>1</sup>

§ 46 (24a). **Prohibition of special Acts conferring Corporate Powers.**—The Constitution of Kansas as well as of Ohio, in the article entitled "Corporations," contains a provision that "the legislature shall pass no *special act* conferring *corporate powers*,"<sup>2</sup> and the Su-

less than that which gave being to the organic law. They are however, subject to control and regulation by the legislature. It may enlarge or circumscribe their territorial limits, increase or diminish their numbers, separate them into parts, and annex some of the parts to parts of others; but they must still assume the form and be known and governed only as counties, cities, or towns. The State at large is, and ever has been, an aggregate of these local bodies." To same effect in same case, 15 N. Y. 541, *per Denio*, C. J.; and see also opinion of *Allen*, J., in *People v. Albertson*, 55 N. Y. 50 (1873). See also *People v. Morrell*, 21 Wend. 563 (division of counties); *ante*, sec. 9 *et seq.* In *People v. Hurlbut*, decided by the Supreme Court of Michigan, in 1871, 24 Mich. 44; s. c. 9 Am. Rep. 103, this subject is largely and learnedly examined by Mr. Justice *Cooley*, who, conceding to the State full authority to shape and control municipal organizations at its will, nevertheless maintained that there were, in the Constitution of that State, both express and implied restrictions upon the legislative dominion over municipal institutions, and that local governments and the right of the people to them were secured by the Constitution, and did not exist by the favor and at the mere pleasure of the legislature. And in the same case the court decided, under a special provision of the Constitution of the State, elsewhere noticed, that the legislature could not appoint, for a city corporation, officers whose duties were purely local and strictly municipal. The discussions by all of the judges are unusually interesting. *Ante*, secs. 8 a-8 d, 11; *post*, chap. iv. In *The State v. Denny and Evansville v. State* (April, 1889), 21 North East. Rep. 252, 267, 274, noted VOL. I. — 6

*post*, sec. 58, the Supreme Court of Indiana holds that the Constitution of that State secures to the people of its incorporated municipalities the right to local self-government, and that this right is therefore incapable of legislative destruction. The opinions of *Elliott*, C. J., and of *Coffey*, *Berkshire*, and *Olds*, JJ., are replete with learning, and are of unusual interest. *Mitchell*, J., dissented on the ground that the legislative acts in question were not in conflict with the Constitution of the State as it now stands. See Constitution of California of 1879, art. xi., entitled "Cities, Counties, and Towns," for provisions which declare or presuppose the continued existence of these organizations.

<sup>1</sup> *Baltimore v. Board of Police*, 15 Md. 376. See also *Patterson v. Society*, &c. 4 Zab. (24 N. J. L.) 385 (1854).

<sup>2</sup> Constitution of *Kansas*, art. xii. Secs. 1 and 2 of art. xiii. of the Constitution of *Ohio* are the same as sec. 1, art. xii. of the Constitution of *Kansas*. Sec. 6, art. xiii. of the *Ohio* Constitution is the same as sec. 5, art. xii. of the *Kansas* Constitution. There is a similar constitutional provision in *Nebraska*, and perhaps in other States. This provision construed (*Clegg v. Richardson Co.*, 8 Neb. 178; *Dundy v. Richardson Co.*, 8 Neb. 508), and held to invalidate certain bonds issued under a special law. *s. p.* *School District v. Insurance Co.*, 103 U. S. 707. The Constitution of *California* declares that "all laws of a general nature shall have a uniform operation." Under this clause it is held that an act exempting particular cases from the operation of a general law is unconstitutional. *Omnibus R. R. Co. v. Baldwin*, 57 Cal. 160, where a *special act* authorizing the construction of a street railway was held void for attempting to

preme Courts of those States have decided that the provision applied to *municipal* as well as private corporations;<sup>1</sup> and that the effect was to compel the legislatures of those States to regulate the grant of powers to municipal corporations by *general* laws. Hence an act *specially* amending the charter of a city in respect to making local improvements or assessments,<sup>2</sup> or specially extending the limits of a particular city,<sup>3</sup> is unconstitutional; and so it seems is an act which authorizes a city by name to issue its scrip for a particular purpose, and to levy taxes to pay it in aid of a single enterprise,—the court inclining to hold such an enactment to be a *special act*, and one which undertook to confer *corporate powers*.<sup>4</sup>

exempt the railway company from the operation of the general law relating to street railways. *Ante*, sec. 45; *post*, sec. 49.

<sup>1</sup> *Atchison v. Bartholow*, 4 Kan. 124 (1866); *Wyandotte City v. Wood*, 5 Kan. 603 (1870); *The State v. Cincinnati*, 20 Ohio St. 18 (1870); following *Atkinson v. Railroad Co.*, 15 Ohio St. 21 (1864). In New Jersey a similar provision is held to apply exclusively to private corporations. *State v. Newark*, 40 N. J. L. 550, 558 (1878).

<sup>2</sup> *Atchison v. Bartholow*, *supra*; *Gilmore v. Norton*, 10 Kan. 491 (1872); *State v. Pugh*, 43 Ohio St. 98 (an act to reorganize cities of the first grade of the second class, and to reduce their tax levy, held to be unconstitutional because it granted authority to such cities to appoint a board of control, thus conferring corporate powers by special act).

<sup>3</sup> *Wyandotte v. Wood*, *supra*; *State v. Cincinnati*, *supra*. In the case last cited, the Supreme Court of Ohio, under the constitutional provision quoted in the text, held that the legislature cannot by special act create a corporation, nor by special act confer additional powers on a corporation already existing; and that in these respects there was no difference between private and municipal corporations, since the Constitution equally embraced and equally applies to both classes; and, therefore, the act of April 16, 1870, "to prescribe the corporate limits of Cincinnati," being considered a special act, was adjudged void. See also *Atkinson v. Railroad Co.*, *supra*. In this case, *Ranney, J.*, thus expounds the Constitution:

"These provisions of the Constitution are too explicit to admit of the least doubt that they were intended to disable the General Assembly from either creating corporations, or conferring upon them corporate powers, by *special* acts of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of making such law applicable to all parts of the State, and thereby securing the vigilance and attention of its whole representation; and finally, of making all judicial construction of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class. We must give such a construction to the Constitution as will preserve its leading objects intact." *Supra*, secs. 41, 45.

<sup>4</sup> *Commercial National Bank v. City of Iola*, 2 Dillon, C. C. R. 353 (1873). In this case the Circuit Judge, delivering the opinion of the court, and referring to the opinion of *Ranney, J.*, quoted in the last note, observed: "One of the objects of the constitutional provision in Kansas, as well as in Ohio, was to cut up by the roots the mischief of special legislation, particularly in respect to corporations, both public and private. This object would be defeated if the special act relating to the city of Iola could stand. If under the doctrine of *Butz v. Muscatine*, 8 Wall. 575, this court is not absolutely bound, in this class of cases, to follow the interpretation of the State Constitution given by its highest court, yet it seems that it ought to follow it where it appears

It was decided that while the provision of the Constitution of *Kansas* that forbids the legislature to pass "any special act conferring corporate powers" includes *municipal corporations proper*, it does not embrace *quasi corporations*, such as school-districts, although the latter are declared by statute to be bodies corporate.<sup>1</sup> In California an act of the legislature which grants to individuals and their assigns certain powers and privileges, and then provides that the act shall not take effect unless such persons within a given time shall organize themselves under existing laws into a corporation, is a grant, not to the *individuals* as persons, but to the *corporation* when formed.<sup>2</sup>

to rest upon solid grounds, and was made in cases and in respect to questions where there was nothing to warp the judgment of its judges, and where the interpretation was settled or had been declared at the time the act in controversy was passed. In the latest case on this subject, decided by the Supreme Court of the United States, it is not denied that the Supreme Court of a State is the appointed expositor of its Constitution and laws, and that the Federal courts will adopt as rules for their own judgments the decisions of the highest courts of the State 'respecting local questions peculiar to itself, or respecting the construction of its own Constitution and laws.' It only denies the binding force of State adjudications which rest upon the general principles of law, and not upon the meaning of special constitutional or legislative provisions. *Olcott v. Supervisors*, 16 Wall. 678 (1872). I think the present case is one in which it is the duty of this court to follow the decisions of the State Supreme Court; and so far as my judgment rests upon the special provisions of the Constitution above referred to, I place it upon the State adjudications without an inquiry into their soundness." The bonds in this case were held invalid mainly on the ground that they were not issued for a public purpose. The judgment of the Circuit Court was affirmed. 20 Wall. 655 (1874). See also *Savings Assoc. v. Topeka*, 3 Dillon, 376 (1874); *post*, sec. 159; also chap. xiv. on Contracts.

Further as to the construction of the provision that "corporate powers" shall not be conferred by *special act*. *School Dist. v. Ins. Co.*, 103 U. S. 707; *State v.*

*Cincinnati*, 20 Ohio St. 18. *Morawetz* on Corp. (2d ed.) secs. 10-13, and cases cited.

Construction of constitutional prohibition against granting right "to lay down railroad tracks in streets by local or private act," see *post*, chap. xviii. on Streets.

<sup>1</sup> *Beach v. Leahy*, 11 Kan. 23 (1878). Under the constitutional provision in question the Supreme Court of *Kansas*, in the *State v. Maloy*, 20 Kan. 619 (1878), ruled the following points as stated by the judges: The act of the legislature entitled "An act authorizing cities therein named to become cities of the second class," approved February 29, 1872, is a special act, conferring corporate powers upon four particular municipal corporations, and is therefore unconstitutional and void, being in contravention of sec. 1 of art. xii. of the Constitution, which provides that "the legislature shall pass no special act conferring corporate powers." 2. The city of Council Grove was organized as a city of the second class, under said special act, and was never organized as a city of the second class under any other act, and has never had a population of two thousand inhabitants. And it was therefore held that said city is not legally a city of the second class.

<sup>2</sup> *San Francisco v. S. V. W. W.*, 48 Cal. 493 (1874). Such an act is an attempt by the legislature in violation of the Constitution to confer powers and privileges upon a corporation by special act. *Id.*; *post*, sec. 49. The Constitution of *Florida* provides that "the legislature shall establish a uniform system of county, township, and municipal government." An act authorizing the dissolution of mu-

§ 47 (25). "**Any Body Politic or Corporate**" construed. — A constitutional provision *that two thirds of the General Assembly* "shall be requisite to *every* bill creating, continuing, altering, or renewing *any body politic or corporate*," was held by a majority of the court of errors, reversing the majority view of the Supreme Court in the same case, to extend to *public* and *municipal*, as well as private corporations.<sup>1</sup> The constitutional provision, however, that "no bill shall contain more than one subject, which shall be clearly expressed in its title," is limited to State legislation and has no application to municipal ordinances.<sup>2</sup>

§ 48 (26). "**Where General Law can be made applicable.**" — Under a Constitution which provides that "*in all cases where a general law can be made applicable, no special law shall be enacted*," the better view, and the one supported by the decided weight of authority, is that it is for the *legislature* to determine whether its purpose can or cannot be expediently effected by a general law; and a special act, as, for example, one providing for the location of the county seat of a specified county, will not be held invalid by the courts.<sup>3</sup>

*municipal corporations* having a bonded indebtedness, the bonds being due, unpaid and unprovided for, upon the written application of one-half of the owners or holders of the bonds, and providing for their reincorporation, was held to be in violation of this provision and void. *State v. Stark*, 18 Fla. 255. See on this subject, however, chap. vii., *post*. But an act creating a *new class* of municipal corporations, imposing upon all the cities of the new class the same powers and duties, is lawful under the provision. *Lake v. Florida*, 18 Fla. 501. See *post*, chaps. vii. and viii.

<sup>1</sup> *Purdy v. People*, 4 Hill (N. Y.), 384 (1842); reversing 2 Hill, 31. What is an *alteration* within this provision. *Corning v. Green*, 23 Barb. 33; *Smith v. Helmer*, 7 Barb. 416; *Morris v. People*, 3 Denio, 381. Where a Constitution requires that acts of incorporation shall have "the assent of at least two-thirds of each house," the word "house" means the members present doing business,—these being a quorum,—and not a majority of all the members elected. *Southworth v. Railroad Co.*, 2 Mich. 287.

<sup>2</sup> *Humboldt v. McCoy*, 23 Kan. 249; *Green v. Indianapolis*, 25 Ind. 490.

<sup>3</sup> *State v. Johnson*, 1 Kan. 178 (1862); *contra*, *Pritz, in re*, 9 Iowa, 30 (1859), where

a special act amending the charter of a city was held invalid because all such laws were, by the Constitution of the State, required to be, and could be, made general. *Von Phul v. Hammer*, 29 Iowa, 222. It is for the legislature, and not the courts, to determine when a general law can be made applicable. *Gentile v. State*, 29 Ind. 409, overruling *Thomas v. Board of Commissioners*, 5 Ind. 4; *Longworth's Executors v. Evansville*, 32 Ind. 322; *Cooley, Const. Lim.* 129, note; *State v. County Court*, 50 Mo. 317 (1872); s. c. 11 Am. Rep. 415; *Murdock v. Woodson*, 2 Dillon, C. C. 188 (1873); *Board of Commissioners v. Shields*, 62 Mo. 247 (1876); *Evans v. Job*, 8 Nev. 322 (1873), where the decisions in that State and elsewhere are reviewed by *Hawley, J.* The word "town"—as used in constitutional inhibition of special laws regulating the internal affairs of towns and counties—is a generic term, including cities. *State v. Parsons*, 40 N. J. L. 1. But in the absence of any clear expression of a contrary intent, the term "municipal corporation" in any statute must be taken in the strict constitutional sense as not including towns. *Eaton v. Manitowoc*, 44 Wis. 489. *Ante*, sec. 20, and note.

§ 49. "Municipal Purpose," what? — The Constitutions of some of the States contain a provision that *corporations shall not be created by special acts except for municipal purposes*. What is a *municipal purpose* within this provision has been several times considered.<sup>1</sup> An act incorporating a board of commissioners for filling up certain slough ponds in the city of St. Louis was held to create a corporation for municipal purposes within the meaning of the Constitution.<sup>2</sup> An act creating a board of park commissioners was considered to constitute them a corporate authority, the object of their creation being municipal in its character.<sup>3</sup> So a corporation to carry on a public school and raise funds for its support.<sup>4</sup>

§ 50 (27). **Legislative Duty held to be discretionary.** — The Constitutions of several of the States contain, substantially, this provision, derived from the Constitution of New York: "*It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debts by such municipal corporations.*"<sup>5</sup> This obviously enjoins upon the legislature the duty of providing suitable and proper restrictions upon the enumerated powers; but in what these restrictions shall consist and how they shall be imposed are subjects left to the discretion or sense of duty of the legislative department, with the exercise of which the courts cannot interfere.<sup>6</sup> The Supreme Court

<sup>1</sup> State, *ex rel.* Choteau v. Leffingwell, 54 Mo. 458 (1873), where the subject is elaborately discussed, and the conclusion reached was that corporations for "municipal purposes" under the Constitution of *Missouri* must be connected with the municipal corporation itself, and be instituted for the purpose of carrying out some of the objects of the municipality. Under the Constitution of *California*, which provides that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes," a corporation cannot exercise any powers except those conferred by general laws. The legislature cannot confer on such corporations any powers or grant them any privileges by special act. *San Francisco v. S. V. W. W.*, 48 Cal. 493 (1874). A grant of an easement in a street made by the legislature to a corporation, is purely a grant of corporate power, and therefore cannot be made to a private

corporation by special act. *Ib. ante*, sec. 46.

<sup>2</sup> *St. Louis v. Shields*, 62 Mo. 247 (1876).

<sup>3</sup> *People v. Salomon*, 51 Ill. 37.

<sup>4</sup> *Horton v. Mobile School Comm'rs*, 43 Ala. 598. See comment of *Wagner, J.*, on this decision in *St. Louis v. Shields*, 62 Mo. 251 (1876).

<sup>5</sup> *New York* Constitution 1846, art. viii. sec. 9; *Wisconsin* Constitution 1848, art. xi. sec. 3; *Michigan* Constitution 1859, art. xii. sec. 13; *Oregon* Constitution 1857, art. xi. sec. 5; *Kansas* Constitution 1859, art. xii. sec. 5; see *Paine v. Spratley*, 5 Kan. 525; *Nevada* Constitution 1864, art. viii. sec. 8; *Nebraska* Constitution, art. viii. sec. 4; *California* Constitution 1849, sec. 37; *Ohio* Constitution 1851, art. xiii. sec. 6. *Post*, sec. 750, note. See also chapters relating to Contracts and Taxation, *post*.

<sup>6</sup> The failure of the legislature to per-

of Wisconsin, in the case cited in the note, holds to some extent a contrary view, but its judgment was in effect, although not in terms, overruled by the Supreme Court of the United States, and it is not, in its full extent, in harmony with the view elsewhere taken in the State courts.<sup>1</sup>

§ 51 (28). "Only One Object, which shall be expressed in the title." — Many of the State Constitutions contain in substance a provision that *no legislative act shall embrace more than one object or, as some of them phrase it, one subject, which shall be expressed in its title.* In some of the Constitutions this prohibition is limited to *local and private acts.* The purpose of such prohibitions is obvious. The unity of object or subject is to prevent "log-rolling legislation," by prohibiting the joining of distinct measures with a view to combine votes for all. Requiring such subject or object to be expressed in the title is to prevent deceptive titles, and to enable members of the legislature, and the people, through the usual publication of legislative proceedings, to form from the title an opinion of the nature and

form the duty relative to restricting the power of taxation, &c., enjoined by the constitutional provision above cited, "may," says *Ramney, J.*, in *Hill v. Higdon*, 5 Ohio St. 248, "be of very serious import, but lays no foundation for *judicial* correction." See *Maloy v. Marietta*, 11 Ohio St. 636, 638, where this view is left open, but holding that the legislature alone has the power to determine the *mode and measure* of the restriction to be imposed. It was also left open in the *People v. Mahaney*, 13 Mich. 481, but this case illustrates what is a sufficient *restriction* on the power of taxation to meet the constitutional requirement. See also *Cooley*, Const. Lim. 518; *Railroad Co. v. Connelly*, 10 Ohio St. 165. To the effect that the constitutional provision quoted in the text does not take away, but recognizes, the *discretion* of the legislature in conferring powers of the enumerated character upon municipal corporations, and that such discretion is not reviewable by the courts, see *Bank of Rome v. Rome*, 18 N. Y. 38 (1858); *Benson v. Mayor, &c. of Albany*, 24 Barb. 248 (1857); *Clarke v. Rochester*, 24 Barb. 446; *Grant v. Courter*, 24 Barb. 232; *Wynehamer v. People*, 13 N. Y. 429; *Baltimore v. State*, 15 Md. 376; *People v. Draper*, 15 N. Y. 532;

*White v. Stamford*, 37 Conn. 587; *Newton v. Atkinson*, 31 Kan. 151 (quoting the text).

<sup>1</sup> *Foster v. Kenosha*, 12 Wis. 616 (1860). The legislature cannot, consistently with this restriction, confer upon a municipal corporation an unlimited power to levy taxes and raise money for extra municipal purposes, such as aiding railroad companies; and an amendment to the charter of a city, authorizing its council "to levy and collect special taxes for *any* purpose (aside from what may be specially provided for in the city charter) which may be considered essential to promote or secure the common interests of the city, or borrow, on the corporate credit of the city, *any* sum of money at a rate of interest not exceeding ten per cent," on obtaining the previous sanction of a majority of the voters of the city, is void, and the requirement of the sanction of the voters is not a restriction on the power to levy taxes or contract debts, within the meaning of the Constitution, the court being of opinion that the duty of imposing the limitation rests on the legislature. *Id.* But see *Campbell v. Kenosha*, 5 Wall. 194 (1866); *City v. Lampson*, 9 Wall. 477 (1869); and the authorities cited in the last note. See

objects of the bill.<sup>1</sup> Subject to the foregoing fundamental requirements the provision has been frequently and properly construed to require only the general or ultimate object to be stated in the title, and not the details by which the object is to be attained. Any provision fairly and reasonably connected with and calculated to carry the declared object into effect is unobjectionable, although not specially indicated in the title. It is sufficient if the title fairly expresses or plainly gives notice or warning of the subject dealt with in the body of the act. Thus, where a Constitution provides that no bill or act shall pass containing any matter different from what is expressed in the title thereof, an act, the title of which declares it to be *for the better regulation of a certain town* (naming it), *or to amend or enlarge the powers of the corporation thereof*, is sufficient, without enumerating the particulars in which the powers are enlarged or extended.<sup>2</sup> So a provision in an act entitled merely, "An act to amend the act incorporating the city of M.," extending the city limits, does not conflict with the constitutional requirement that "every law shall embrace but one object, which shall be expressed in its title."<sup>3</sup> Many illustrations of the judicial construction

Rogan v. Watertown, 30 Wis. 259 (1872), as to *loaning credit*.

For other restrictions upon the power to contract debts and limitations upon such power, see chapters on Charters and Contracts, *post*.

<sup>1</sup> Carter County v. Sinton (Const. Ky.), 120 U. S. 517; Montclair v. Ramsdell (Const. New Jersey), 107 U. S. 147; Jonesboro v. Cairo, &c. R. R. (Const. Ill.), 110 U. S. 192; Mahomet v. Quackenbush (Const. Ill.), 117 U. S. 509; Otoe County v. Baldwin (Const. Neb.), 111 U. S. 1; Ackley School Dist. v. Hall (Const. Iowa), 113 U. S. 135; *Re* Phenixville, 109 Pa. St. 44; *Re* Airy Street, 113 Pa. St. 281; Cooley, Const. Lim. 141-151, and authorities.

<sup>2</sup> Green v. Mayor, R. M. Charl. (Ga.) 368 (1832), *per Law, J.*; Mayor v. State, 4 Ga. 26; Hill v. Decatur, 22 Ga. 203. Text affirmed. Luehrman v. Taxing Dist., 2 Lea (Tenn.), 425; Murphy v. State, 9 Lea (Tenn.), 373. An act which, in effect, amended the charters of cities of a certain class held void because this purpose did not appear in its title. State v. Wright, 14 Ore. 365.

<sup>3</sup> Morford v. Unger, 8 Iowa, 82 (1859); Davis v. Woolnough (act establishing city

court), 9 Iowa, 104; s. r. St. Paul v. Coulter, 12 Minn. 41, 50 (1866).

The subject of a law to incorporate a city or town is the *charter of incorporation*, and the title need not enumerate all the powers intended to be conferred. Lockhart v. Troy, 48 Ala. 581 (1872). Where the title to an act is "*to consolidate and amend the several acts incorporating the city of Brunswick, and for other purposes therein mentioned*," and the act contains a provision to make valid and confirm "*all the ordinances of the mayor and city council of the city of Brunswick heretofore passed*, and not in conflict with the Constitution of the State of Georgia or of the United States," it was held that it was in violation of the Constitution of 1868, which declares: "Nor shall any law or ordinance pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof." Brieswick v. Brunswick, 51 Ga. 639 (1874). And in a later case it was held that the Act of 1872, entitled "to prescribe the manner of incorporating towns and villages," not having indicated by its title the provision making the act an amendment of existing municipal charters, is unconsti-

of this constitutional provision as applicable to municipalities are given in the note.

tutional. *Ayeridge v. Comm'rs*, 60 Ga. 404.

A statute designated in its title as an amendment to a city charter, but which embraces objects foreign to the charter, is in conflict with the Constitution and void. *Williamson v. Keokuk*, 44 Iowa, 88 (1876). The judgment in the case last cited would seem to be of doubtful correctness upon the facts.

In determining whether a law be in conflict with the provision of the Constitution, the unity of the object is to be looked for in the ultimate end to be attained, and not in the details leading to that end. *State, &c. v. Co. Judge*, 2 Iowa, 280; *People v. Mahaney*, 13 Mich. 481 (1865), holding that the title of "an act to establish a police government for the city of Detroit," was sufficiently specific; approved, *White v. Lincoln*, 5 Neb. 505, (1877); *Atty. Gen. v. Bradley*, 36 Mich. 447 (1877); *People v. Hurlbut*, 24 Mich. 44 (1871); s. c. 9 Am. Rep. 103. *Construction of similar constitutional provision.* *Arnoult v. New Orleans*, 11 La. An. 54; *Kathman v. New Orleans*, 11 La. An. 145; *People v. Mellen*, 32 Ill. 181; *Railroad Co. v. Gregory*, 15 Ill. 21; *Davis v. State* (inspection act for Baltimore), 7 Md. 151; *Annapolis v. State*, 30 Md. 212; *Lafon v. Dufrocq*, 6 La. An. 350; *Re Airy Street*, 113 Pa. St. 281 (1886); *Re Phoenixville*, 109 Pa. St. 44; *Ottawa v. People*, 48 Ill. 233 (1868); *Miles v. Charleton*, 29 Wis. 400 (1872); *Murdock v. Woodson*, 2 Dillon, C. C. R. 188 (1873); *Hubert v. People*, 49 N. Y. 132 (1872); *State v. Union*, 33 N. J. L. 350 (4 Vroom), where the subject is fully discussed. *Montclair v. Ramsdell*, 107 U. S. 147, in which Mr. Justice Harlan quoted the opinion in *State v. Union*, *supra*, and added, "The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or if but one object, that it was not sufficiently expressed by the title." *Montclair v. Ramsdell*, *supra*, followed in *State v. Comm'rs of Duval Co.*,

23 Fla. 483 (1887). See, also, *State v. Elvins*, 32 N. J. L. (3 Vroom), 362; *State v. Newark*, 34 N. J. L. (5 Vroom) 236; *In re Comm'rs of Elizabeth*, 49 N. J. L. (20 Vroom), 488; *Sedgwick Co. v. Bailey*, 13 Kan. 600 (1874); *Comm'rs of Marion Co. v. Comm'rs of Harvey Co.*, 26 Kan. 181; *Devlin v. New York*, 63 N. Y. 8 (1875); *People v. Willsea*, 60 N. Y. 507 (1875); *Tecumseh v. Phillips*, 5 Neb. 305 (1877); *Dows v. Town of Elmwood*, 34 Fed. Rep. 114; *Baltimore & Ohio R. Co. v. County of Jefferson*, 29 Fed. Rep. 305. An act public in its nature, in which the people of the whole State have an interest, but which specially concerns the property and rights of a portion of the people of the State, is a local act within the meaning of the Constitution of Illinois, 1848 (art. 3, sec. 23), requiring the subject thereof to be expressed in the title (citing and reviewing various cases in Illinois and elsewhere on this subject). Applying these principles to an act of the Illinois legislature of April 16, 1869, known as the Lake Front Act, entitled "An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan on the eastern frontage of the City of Chicago," it was held that since the general subject of that act was the disposal of lands on and adjacent to the shore of Lake Michigan on the eastern frontage of Chicago, the subject was sufficiently expressed in the title within the meaning of the Constitution, which provides that all local laws must contain but one subject, which must be expressed in the title. *Illinois v. Ill. Cent. R. R. Co.* (Lake Front Case), 33 Fed. Rep. 730 (*Harlan and Blodgett, JJ.*). Where the act has but one general object it is sufficient if the object or subject is fairly expressed in the title. *White v. Lincoln*, 5 Neb. 505 (1877); *Black v. Cohen*, 52 Ga. 621 (1874); *Lockport v. Gaylord*, 61 Ill. 276 (1871), where a curative act legalizing warrants was held invalid because it did not set forth the subject-matter in the title. In *Watertown v. Fairbanks*, 65 N. Y. 588 (1875), a legislative act vali-



dating previous illegal assessments was held to conflict with the constitutional requirement (art. 3, sec. 16), that "no private or local bill shall embrace more than one subject, and that shall be expressed in the title." An act entitled "An act to legalize and authorize the assessment of street improvements and assessments," not specifying any city or locality, held not sufficiently to express the subject of the act, which was solely to legalize certain proceedings of the common council of a single city. *Durkee v. City of Janesville*, 26 Wis. 697. Under an act to revise the charter of a specified city, there may be conferred upon the municipality the usual legislative, taxing, judicial and police powers, including the creation of a city court. This is but one subject, and a charter with such a title does not infringe the provision of the Constitution that no local bill shall embrace more than one subject which shall be expressed in its title. *Harris v. People*, 59 N. Y. 599 (1875), where *Folger, J.*, explains the object of this constitutional provision to be "to prevent the joining of one local subject to another or others of the same kind, or to one or more general subjects, so that each should gather votes for all; and to advise the public and the locality, and the representatives of the locality and of other parts, of the general purpose of the bill, so that those interested might be on their guard as to the whole or as to the details." *People v. Supervisors*, 43 N. Y. 10. See also *Sullivan v. New York*, 53 N. Y. 652 (1873); *Volkening, In re*, 52 N. Y. 650 (1873); *Astor, In re*, 50 N. Y. 363 (1872); *Mayer, In re*, 50 N. Y. 504 (1872); and *People v. Briggs*, 50 N. Y. 553, where the purpose of the constitutional provision is well expounded by *Church, C. J.* *People v. Rochester*, 50 N. Y. 525 (1872). The word "private" (art. 3, sec. 16, *supra*) refers to "persons," the word "local" to "territory." *People v. O'Brien*, 38 N. Y. 193; *People v. Supervisors*, 43 N. Y. 10; *People v. Hills*, 35 N. Y. 449, 451.

The constitutional provision in New York as to the title of local and private bills (art. 3, sec. 16, *supra*), underwent careful consideration in the Court of Appeals in the great cases of *Astor and Bailey v. New York Arcade Railway Co.* (1889)

(not yet reported, but will probably appear in 113 or 114 N. Y. Rep.), relating to the right of the defendant company to construct an underground railway in *Broadway and Madison Avenue* in New York City. It was incorporated in 1868, by a local and private act to transmit packages and merchandise by means of pneumatic tubes. In 1873, by local and private act its charter was amended, and the title thereof expressed that it was an act "to provide for the transportation of passengers in said [pneumatic] tubes." In the body of this amended act, however, the corporation was given authority to construct and operate an ordinary railway under the said streets. The amended act of 1873 was held to be unconstitutional because the title was deceptive. Giving the judgment of the court on this point, *Earl, J.*, said: "The construction of such a railway [an ordinary railroad] by such a corporation is certainly a subject not expressed in the title of the act. The only subject there indicated is the transportation of passengers and property through pneumatic tubes by atmospheric pressure. A title purporting that an act provides for pneumatic transportation, would not be sufficient for an act authorizing the construction and operation of a horse railway or a steam railway, as a title purporting that an act authorizes a line of omnibuses for the transportation of passengers would not be sufficient for an act authorizing the construction of a railway for the same purpose. The constitutional provision referred to has been deemed by statesmen and jurists — *conditores legum* — of so much importance that it is found in the fundamental law of most of the States. Its purpose is to prevent fraud and deception by concealment in the body of acts subjects not by their titles disclosed to the general public, and to legislators who may rely upon them for information as to pending legislation. When the subject is expressed, all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the act, and are germane to the title. The title must be such at least as fairly to suggest or give a clue to the subject dealt with in the act, and unless it comes up to this standard it falls below the constitutional

requirement (*The Mayor, &c. v. Colegate*, 12 N. Y. 146; *People v. Hills*, 35 N. Y. 449, 452; *Matter of New York, &c. Bridge*, 72 N. Y. 527; *Matter of Application of Department of Public Parks*, 86 N. Y. 439; *People v. Whitlock*, 92 N. Y. 191; *Matter of Knaust*, 101 N. Y. 188; *Cooley, Constitutional Limitations*, 141). Here the only subject suggested by the title is the transportation of passengers and property through pneumatic tubes, by atmospheric pressure, and everything appropriate and germane to that subject could be pro-

vided for in the act. But a person reading the title alone would have no clue whatever to the great railway scheme actually authorized by the act."

If, however, a local act contains a subject which is properly expressed in its title it is valid as to that subject although it is invalid as to a subject *not* expressed. *Van Antwerp, In re*, 56 N. Y. 261, 267 (1874); *s. v. McGee's Appeal*, 114 Pa. St. 470, 478 (1886); *Dewhurst v. Allegheny City*, 95 Pa. St. 437; *Cooley, Const. Lim.* 148.

## CHAPTER IV.

## PUBLIC AND PRIVATE CORPORATIONS DISTINGUISHED.—LEGISLATIVE AUTHORITY AND ITS LIMITATIONS.

§ 52 (29). **Public and Private.**—A *fundamental division* of corporations, heretofore adverted to, is into *public* and *private*.<sup>1</sup> The

<sup>1</sup> *Ante*, chap. ii. secs. 19–27. In *Mills v. Williams*, 11 Ired. (N. C.) Law, 558, (1854). *Pearson, J.*, commenting on the common division of corporations, says: “The purpose in making all corporations is the accomplishment of some *public good*. Hence, the division into public and private has a tendency to confuse and lead to error in investigation; for, unless the public are to be benefited, it is no more lawful to confer ‘exclusive rights and privileges’ upon an artificial body than upon a private citizen. The substantial distinction is this: Some corporations are created by the *mere will* of the legislature, there being no other *party interested or concerned*. To this body a portion of the power of the legislature is delegated to be exercised for the public good, and it is subject at all times to be modified, changed, or annulled. Other corporations are the result of *contract*. The legislature is not the only party interested; for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a *second party*. These two make a contract. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. *It is a contract*, and, therefore, cannot be modified, changed, or annulled without the consent of both parties. Counties are an instance of the former, railroad and turnpike companies of the latter class of corporations.” This recognizes the substantial difference between the two classes of corporations, and is, in effect, a criticism upon the names by which they are distinguished.

According to the view of the Supreme

Court of California, corporations should be divided into three classes, to wit: Public municipal corporations, the object of which is to promote the public interest; corporations technically private, but of a *quasi* public character, having in view some public enterprise in which the public interests are involved, such as railroad, turnpike, and canal companies; and corporations strictly private. *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543 (1869). The opinion of *Sawyer, C. J.*, in this case, is able and instructive. The author prefers the ordinary division of corporations into public (which includes municipal) and private. The Civil Code of California thus defines public and private corporations (sec. 284): “Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the State; all other corporations are private.” Construing this section, it was held in *Dean v. Davis*, 51 Cal. 406, 410, that a levee district formed under an act of the legislature for reclamation purposes was a public corporation. *Crockett, J.*, says: “It is true, perhaps, that it was not formed or organized for the government of a portion of the State, in the broadest sense of the term; nevertheless it exercises certain governmental functions within the district. To constitute a public corporation, it is not essential that it shall exercise all the functions of government within the prescribed district.” s. r., see, also, *People v. Reclamation District*, 53 Cal. 346; *Hoke v. Perdue*, 62 Cal. 545. See *Foster v. Fowler*, 60 Pa. St. 27 (1868), in which a company created to supply a city with water was

importance of this distinction cannot be too much emphasized, since upon it are based the legal principles which so broadly distinguish the two classes of corporations. With private corporations the present work has no other concern than to point out by way of illustration wherein they differ from those which are public. Both classes are alike created by the legislature, and in the same way,—by special charter or under general incorporation acts.

§ 53. "Private" defined; *Dartmouth College Case*.—*Private corporations* are created for private, as distinguished from purely public purposes, and they are not, in contemplation of law, public, because it may have been supposed by the legislature that their establishment would promote, either directly or consequentially, the public interest. They cannot be compelled to accept a charter or incorporating act.<sup>1</sup> The *assent of the corporation* is necessary to make the incorporating statute operative; but when assented to, the legislative grant is irrevocable, and it cannot, without the consent of the corporation, be impaired or destroyed by any subsequent act of legislation, unless the right to do so was reserved at the time. The celebrated *Dartmouth College Case*,<sup>2</sup> by its construction of the Federal Constitution, incorporated, wisely or otherwise, into American jurisprudence the principle which has been attended with such important practical consequences, namely, that privileges and franchises granted by legislative act to a private corporation, when accepted, constitute

held to be a public, as distinguished from a private corporation. Unless there is some special constitutional restriction, the legislature of a State may regulate the compensation of grain elevators and public warehouses, and fix a maximum rate of charges. *Munn v. People*, 69 Ill. 80 (1873). Affirmed in the Supreme Court of U. S. *Munn v. People*, 94 U. S. 313 (1876). The same principle, as respects the legislative right to regulate the charges for railway transportation services, was asserted and applied by the Supreme Court of the United States in what is popularly known as the "granger" cases. *Chicago, B., & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Pike v. Chicago & N. W. R. R. Co.*, 94 U. S. 164; *Lawrence v. Chicago & N. W. R. Co.*, 94 U. S. 164; *Chicago, M., & St. P. R. Co. v. Ackley*, 94 U. S. 179; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 181; *Southern Minn. R. R. Co. v. Coleman*, 94 U. S. 181; *Stone v. Wisconsin*, 94 U. S. 181. The limitations upon this general

right remain to be yet fully determined. An enactment exercising this right might be of such a nature as to deprive the corporation of its property without due process of law.

<sup>1</sup> *Ante*, sec. 44.

<sup>2</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518. All attempts to overthrow this judgment have failed. In the great case of the *People v. O'Brien, Receiver*, arising out of the acts of the legislature of New York in 1886, repealing the charter of the *Broadway Surface Railway Company*, and dissolving that corporation, decided by the Court of Appeals of New York (111 N. Y. 1, 1888), *Ruger, C. J.*, speaking of the *Dartmouth College Case*, says: "Although it has sometimes been criticised, it has been uniformly acquiesced in by the courts of the several States as the law of the land, and may be regarded as too firmly settled to admit of question or dispute." *Infra*, sec. 68 a; *post*, sec. 112.

a *contract* within the meaning of the clause of the Constitution which secures inviolability of contracts by ordaining that no State shall pass any law impairing their obligation; and hence a law materially altering the charter of such a corporation is unconstitutional, unless the power to alter it was reserved, either generally or specially, when the grant was made.

§ 54 (30). **Public Corporations defined.**—*Public including municipal corporations* are called into being at the pleasure of the State, and while the State may, and in the case of municipal corporations usually does, it need not, obtain the consent of the people of the locality to be affected. The *charter or incorporating act* of a municipal corporation is in no sense a contract between the State and the corporation, although, as we shall presently see, vested rights in favor of third persons, if not indeed in favor of the corporation or rather the community which is incorporated, may arise under it. Public corporations within the meaning of this rule are such as are established for public purposes exclusively,—that is, for purposes connected with the administration of civil or of local government,—and corporations are public only when, in the language of Chief-Justice Marshall, “the whole interests and franchises are the exclusive property and domain of the government itself,” such as *quasi* corporations (so called), counties and towns or cities upon which are conferred the powers of local administration. Subject to constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent: it may, where there is no constitutional inhibition, erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require.<sup>1</sup>

<sup>1</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819); *Allen v. McKean*, 1 Sumner, 276 (1833) (the Bowdoin College Case elaborately considered by Story, J.); see reference to this case, 2 Story's Life and Letters, 150; *Patterson v. Society, &c.*, 4 Zab. (24 N. J. L.) 385; *Cheany v. Hooser*, 9 B. Mon. 330; *Berlin v. Gorham*, 34 N. H. 266; *Meriwether v. Garrett* (repeal of charter of city of Memphis), 102 U. S. 472, 511, (1880), citing text; *Sinton v. Carter Co.*, 23 Fed. Rep. 535; *People v. Morris*, 13 Wend. 325 (1835). In this case the defendant insisted that the rights and privileges conferred upon the village of Ogdensburg by the act incorporating it were *vested rights*, and

could not be impaired by subsequent legislation. But, said Nelson, J., with his usual clearness, “It is an unsound and even absurd proposition that political power conferred by the legislature can become a vested right as *against the government* in any individual or body of men.” *s. p.* *Penobscot Boom Corporation v. Lawson*, 16 Me. 224; *Yarmouth v. North Yarmouth*, 34 Me. 411 (1852); *Story*, Com. Const., secs. 1385, 1388; *North Yarmouth v. Skillings*, 45 Me. 133 (1858); *Girard v. Philadelphia*, 7 Wall. 1 (1868); *United States v. Railroad Co.*, 17 Wall. 322; *Philadelphia v. Fox*, 64 Pa. St. 169; *Mobile v. Watson*, 116 U. S. 289 (1885); *ante*, sec. 9; *Jersey City v. Railroad Co.*,

§ 55. **Form of Grant does not affect Extent of Power.**—The extent of the legislative control over public or municipal corporations is not

20 N. J. Eq. 360; *Rundle v. Del. & Canal Co.*, 1 Wall. Jr. 275, s. c. 14 How. 80; *Tinsman v. Railroad Co.*, 2 Dutch. (N. J.) 148; *State v. Brannin*, 3 Zab. (23 N. J. L.) 485; *State v. Fuller*, 5 Vroom (34 N. J. L.) 227; *Patterson v. Society, &c.*, 4 Zab. (24 N. J. L.) 385; *ante*, sec. 44; *State v. Jennings*, 27 Ark. 419 (1872); *Clinton v. Railroad Co.*, 24 Iowa, 455; *San Francisco v. Canavan*, 42 Cal. 541; *Demarest v. New York*, 74 N. Y. 161, s. c. below, 11 Hun, 19; *Cornell v. People*, 107 Ill. 372; *Lutz v. Crawfordsville*, 109 Ind. 466; *Wood v. Town of Oxford*, 97 N. C. 227; *David v. Portland Water Comm'rs*, 14 Oreg. 98; *Portland & W. V. R. R. Co. v. Portland*, 14 Oreg. 188; *In re Malone's Estate*, 21 S. C. 435; *Morris v. State*, 62 Tex. 728. "A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the legislature. Such is a public corporation, used for public purposes." *Per McLean, J.*, in *State Bank v. Knoop*, 16 How. U. S. 369, 380 (1853). "Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred upon them are not vested rights as against the State, but, being wholly political, exist only during the will of the general legislature; otherwise, there would be numberless petty governments existing within the State and forming part of it, but independent of the control of the sovereign power. Such powers may at any time be repealed or abrogated by the legislature, either by a general law operating upon the whole State, or by a special act altering the powers of the corporation." *Sloan v. State* (implied modification of charter as to vending liquor by subsequent general law), 8 Blackf. (Ind.) 361 (1847), *per Smith, J.* Approving *People v. Morris*, 13 Wend. 325; *Armstrong v. Comm.* (as to removal of county seat), 4 Blackf. (Ind.) 208 (1836); *post*, secs. 62, 183.

In the case of the United States *v. The Baltimore & Ohio Railroad Company*, decided by the United States Supreme Court, 17 Wall. 322 (1872), in which it

was held that the *general government could not tax the income or property of the city of Baltimore* under the Internal Revenue Act (*post*, sec. 775), the court discusses and examines the nature of municipal corporations and the relation they sustain to the State, of which they are treated as arms or agencies. The court says, "A municipal corporation like the city of Baltimore is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State, in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation." *Post*, secs. 100, 773, 775.

*As to extent of LEGISLATIVE CONTROL, and the distinction between PUBLIC and PRIVATE corporations in this respect*, see *infra*, secs. 66, 68 *a*, 72-74 *a*, and cases; *Cooley, Taxation* (2d ed.), 688. See, also, *People v. Wren* (division of a county), 4 Scam. (Ill.) 273; *Martin v. Dix*, 52 Miss. 53 (1876); *People v. Detroit*, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202; *New Orleans, &c. Co. v. New Orleans*, 26 La. An. 517; *Coles v. Madison County*, Breese (Ill.), 120; *Laramie County v. Albany County*, 92 U. S. 307 (1875); *C. & A. R. R. Co. v. Adler*, 56 Ill. 344; *State v. Brannin*, 3 Zab. (23 N. J. L.) 485; *Rader v. Road Dist.*, 7 Vroom (36 N. J. L.), 273; *Bush v. Shipman*, 4 Scam. (5 Ill.) 190; *Holliday v. People*, 5 Gilm. (10 Ill.) 216; *Richland County v. Lawrence County*, 12 Ill. 8; *Trustees, &c. v. Tatman*, 13 Ill. 30; *Gutzwiller v. People*, 14 Ill. 142; *Sangamon County v. Springfield*, 63 Ill. 66 (1872); *State v. Mayor, R. M. Charl't.* (Ga.) 250; *State, &c. v. St. Louis County Court*, 34 Mo. 546; *Purdy v. People*, 4 Hill (N. Y.), 385; *Morey v. Newfane*, 8 Barb. 645; *Lloyd v.*

impaired by reason of the fact that the charter is granted in the *same act that creates a private corporation*, whose rights cannot be changed without its consent.<sup>1</sup> Where, in incorporating a gas company, the legislature reserved the power to alter, modify, or repeal the charter, it is competent for it, by subsequent legislation, to subject the company to supervision and control, and to confer upon the municipal corporation in which the works of the company are erected the power to regulate the price of gas, and ordinances duly passed in pursuance of such power are binding upon the company.<sup>2</sup>

§ 56 (31). **Differences between Public and Private Corporations illustrated.** — Some of the leading *differences between public and private*

Mayor, &c. of New York, 5 N. Y. (1 Seld.) 369; *Lowber v. Same*, 7 Abb. Pr. R. 248; *Green v. Same*, 5 Abb. Pr. R. 503; *Aurora v. West*, 9 Ind. 74; *Plymouth v. Jackson*, 15 Pa. St. 44; *Louisville v. Commonwealth*, 1 Duvall (Ky.), 295; *Murphy v. Louisville*, 9 Bush (Ky.), 189 (1872); *O'Hara v. Portland*, 3 Oreg. 525; *Gray v. Brooklyn*, 10 Abb. (N. Y.) Pr. Rep. n. s. 186; *State v. Hundelhausen*, 26 Wis. 432 (1870); *Tinsman v. Railroad Company*, 2 Dutch. (N. J.) 148; *Marietta v. Fearing*, 4 Ohio, 427; *Richmond v. Richmond, &c. Railroad Co.*, 21 Gratt. (Va.) 604 (1872); *State v. Mayor, &c.*, 24 Ala. 701; *Governor v. McEwen*, 5 Humph. (Tenn.) 241; *Grogan v. San Francisco*, 18 Cal. 590; *Darlington v. Mayor, &c. of New York*, 31 N. Y. 164; *Savings Fund Society v. Philadelphia*, 31 Pa. St. 175, 185; *Philadelphia v. Field*, 58 Pa. St. 320; *infra*, sec. 80; *Erie v. Canal Company*, 59 Pa. St. 174; *Dunsmore's Appeal*, 52 Pa. St. 374; *Blanding v. Burr*, 13 Cal. 343 (1859); *People v. Hill*, 7 Cal. 97 (1857); *Nichol v. Mayor, &c.*, 9 Humph. 252; *Creighton v. San Francisco*, 42 Cal. 446 (1871); *Lucas v. Tippecanoe Co.*, 44 Ind. 524 (1873); *Burns v. Clarion County*, 62 Pa. St. (1869); *Durach's Appeal*, 62 Pa. St. 491; *New Orleans v. Hoyle*, 23 La. An. 740; *Amite City v. Clements*, 24 La. An. 27 (1872); 21 Am. Law Review 14.

This subject is discussed in an interesting manner by *Sharswood, J.*, in his learned judgment, in *Philadelphia v. Fox*,

64 Pa. St. 169 (1870). The doctrine is here laid down that since the legislature cannot alienate any part of its legislative power, it cannot therefore by legislative act or contract invest any municipal corporation with an *irrevocable franchise* of government over any part of its territory. *Ib.* 181; *post*, secs. 64, 68, 72-74 a, 80, 567. In *Louisiana* the recall and abrogation by the legislature of powers conferred upon a municipal corporation and vesting them in another, is said to be a proper exercise of the *police power* of the State. *Pickles v. Dry Dock Co.*, 38 La. An. 412. Police power is, however, a very indefinite term, and is often used to express the sum of the legislative power of the State not within the limitations of the Federal and State Constitutions. Dissolution and legislative extinction of municipal corporation, by repeal of its charter, see *post*, secs. 170, 185, 189; also, 21 Am. Law Review, 14.

<sup>1</sup> *Patterson v. Society, &c.*, 4 Zabr. (24 N. J. L.) 385 (1854). See, also, *Baltimore v. Board of Police*, 15 Md. 376 (1859). Text approved. *Luehrman v. Taxing District*, 2 Lea (Tenn.), 425.

<sup>2</sup> *State v. Cincinnati Gas Co.*, 18 Ohio St. 262 (1868). See, also, *Norwich Gas-light Co. v. Norwich City Gas Co.*, 25 Conn. 19 (1856); *State v. Milwaukee Gas-light Co.*, 29 Wis. 454 (1872). It is, we suppose, to be implied that ordinances such as those mentioned in the text shall be reasonable, and not confiscatory, in their nature and operation.

*corporations* are well illustrated and clearly stated in a case decided in New Jersey. In an action by a riparian proprietor against a *canal company*, for obstructing a water-course, the company insisted that it was not liable, because the work was authorized by its charter; that the acts it did were legal; that the injury complained of was consequential; that the enterprise was a public work, designed for public purposes, and that the company, in executing it, acted as the public agents of the State and, therefore, possessed the State's immunity from liability. But the court held that the company was not a public corporation. On this point Nevius, J., the organ of the court, observed: "Public corporations are political corporations, or such as are founded wholly for public purposes, and the *whole* interest in which is in the public. The fact of the public having an interest in the works or the property or the object of a corporation does not make it a public corporation. All corporations, whether public or private, are, in contemplation of law, founded upon the principle that they will promote the interest or convenience of the public. A bank is a private corporation, yet it is, in the eye of the law, designed for public benefit. A turnpike or a canal company is a private company, yet the public have an interest in the use of their works, subject to such tolls and restrictions as the charter has imposed. The interest, therefore, which the public may have in the property or in the objects of a corporation, whether direct or incidental (unless it has the whole interest), does not determine its character as a public or private corporation. In the present case, whatever may have been the objects of the corporation, whether to erect a public navigable highway or to improve the navigation of the Raritan River, or whether the public have a right to the use and enjoyment of these improvements, when made, or not, the company are essentially a private company, and are not [in the sense which will confer the State's exemption from liability] the agents of the State. Their works are not constructed by the requirement of the State, or at the expense of the State, nor does the stock belong to the State, nor is the State answerable for the lands or materials used in the construction of these works, or responsible for the debts of the company, or for injuries committed by them in the execution of their work. The State could not compel the company to construct this canal or improve the navigation of the river; it has permitted them to do so at their own request. The company might have abandoned the work whenever they saw fit; they may now abandon it without responsibility to the State. The corporation itself, the property of the corporation, the object of the corporation, are essentially private, subject only to public use, under their own



restrictions, and from which use the company are to derive the profits."<sup>1</sup>

§ 57 (32). **Scope of Legislative Authority.**—The adjudged cases exhibit some contrariety of opinion respecting the *scope of legislative authority over municipal corporations*, or rather respecting the question how far such corporations, viewed as legal personalities, and as

<sup>1</sup> *Nevius, J., Ten Eyck v. Canal Co.*, 3 Harrison (N. J.), 200, 203 (1841); approved, *Hanson v. Vernon*, 27 Iowa, 28, 53 (1869).

In an elaborate and well-considered opinion, in which the court of appeals of Maryland held the *regents of the university of that State to be a private corporation*, though its ends were public, *Buchanan, C. J.*, delivering the judgment of the court, thus defines a public corporation: "A PUBLIC CORPORATION is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government, subject to the control of the legislature, and its members officers of the government, for the administration or discharge of public duties, as in the cases of cities, towns, &c.; so where a bank is created by the government for its own uses, and the stock belongs exclusively to the government, it is a public corporation; and so of a hospital created and endowed by a government for general purposes of charity." *Regents of University v. Williams*, 9 Gill & Johns. (Md.) 365, 397 (1838). See, also, *Norris v. Trustees*, 7 Gill & Johns. 7. The University of the State of Nebraska is a public corporation. *Regents v. McConnell*, 5 Neb. 423 (1877); *post*, sec. 60, note.

Speaking of *public corporations*, and the relations they sustain to the State, the Supreme Court of Louisiana uses this language: "The government of cities and towns, like that of the police jury of parishes (counties), forms one of the subdivisions of the internal administration of the State, and is absolutely under the control of the legislature. The laws which establish and regulate municipal corporations are not contracts, but ordinary acts of legislation, and the powers they confer are

nothing more than mandates of the sovereign power, and those laws may be repealed or altered at the will of the legislature, except so far as the repeal or change may affect the rights of third persons acquired under them." *Police Jury v. Shreveport* (repeal of corporation ferry right), 5 La. An. 661 (1850); *State Bank v. Navigation Co.* (construction of charter), 3 La. An. 294 (1848); *Reynolds v. Baldwin*, 1 La. An. 162; *Haynes v. Municipality*, 5 La. An. 760; *Edgerton v. Municipality*, 1 La. An. 435; *Board v. Municipality*, 6 La. An. 21 (1851). The same doctrine is affirmed, and the supremacy of the legislature over municipal corporations and their *funds and franchises* is asserted, in *Amite City v. Clements*, 24 La. An. 27 (1872).

In the opinion of the Supreme Court of the United States, holding that the legislature of a State might lawfully repeal or discontinue a ferry franchise granted to a municipal corporation, it is remarked that towns and cities, "which are public municipal and political bodies, are incorporated for public, and not private, objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached or levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions named, and therefore to be considered as not violated by subsequent legislative changes." *Per Woodbury, J.*, in *East Hartford v. Hartford Company*, 10 How. (U. S.) 511, 531 (1850); *Railroad Co. v. Ellerman*, 105 U. S. 166 (1881). See also *Trustees v. Tatman*, 13 Ill. 30; *New Orleans v. Hoyle*, 23 La. An. 740.

such representing special rights of the community that is incorporated, are within the operation or protection of the usual constitutional restraints upon legislative power. The present chapter will be devoted to a consideration of this subject. In dealing with questions of this delicate and complex nature we must beware of broad propositions, and avoid general speculations. The only wise and safe course is to keep near the shore and within the light of actual adjudications, accompanying these with such observations as seem to be required. The extent of the authority of the legislature over public corporations is strikingly illustrated by an important case decided by the court of appeals in the State of Maryland. The legislature in incorporating a railroad company made it its duty to locate its road through three towns specially named, and provided that if it failed to do so, "then and in that case said company shall forfeit \$1,000,000 to the State of Maryland *for the use of Washington County.*" The action was instituted for the benefit of the county to recover the \$1,000,000, it being alleged that the defendant had not constructed its road in the manner required. The defendant pleaded that *since* the last continuance of the cause the legislature had passed an *act repealing* that portion of the charter of the company requiring it to build its road through those towns, and *specially remitting and releasing the forfeiture of \$1,000,000.* The leading question, which was argued on either side by distinguished counsel, was, whether the provision in favor of the county was one of *contract* (the railroad company having assented to the act), and hence claimed to be inviolable by legislative interference, or whether it was one of *penalty* and therefore subject to unlimited legislative control. The court held the latter view to be the true one, and that the defendant was not liable. The court also expressed the opinion that *if it should be treated as a contract made by the State*, yet it was a contract for the benefit of one of its counties, to which the money, if collected, would belong in its political and public capacity as part of the State; and that such a contract did not come within the meaning of that provision of the national Constitution which prohibits a State from impairing the obligation of a contract, so as to prevent the legislature from releasing it at pleasure or discontinuing an action brought for its enforcement in the name of the State.<sup>1</sup>

<sup>1</sup> State v. Railroad Co., 12 Gill & Johns. (Md.) 399 (1842). Affirmed on error. 3 How. (U. S.) 534 (1844); C. & A. R. R. Co. v. Adler, 56 Ill. 344 (1870). Although the forfeiture in the case mentioned in the text was to the county (a public corporation), the same doctrine

would have applied, if the forfeiture had, in such a case, been to a city or municipal corporation. *Infra*, sec. 61.

A public corporation has no *vested right to fines* directed to be paid to it, and the legislature may release them. No contract in such cases is thereby violated, for

§ 58 (33). **Offices and Officers; Municipal Officers defined; Mode of Appointment.** — Questions have arisen *under special Constitutional provisions* respecting the authority of the legislature over *municipal offices and officers*. And here it is important to bear in mind the before mentioned distinction between *State* officers — that is, officers whose duties concern the State at large, or the general public although exercised within defined territorial limits — and *municipal* officers, whose functions relate exclusively to local concerns of the particular municipality. The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gas-works, of water-works, the construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the State at large.<sup>1</sup> The Constitution of Michigan enjoined upon the legislature to “provide for the incorporation and organization of cities and villages,” gave it authority to confer upon them such powers of a local legislative and administrative character as it should deem proper, and contained the further provision that “*judicial officers of cities and villages shall be elected, and all other [municipal] officers shall be elected or appointed, at such time and in such manner as the legislature may direct*”; and it was held by the Supreme Court of the State in a cause that underwent great consideration, and in which the judges delivered separate opinions, that while the legislature was left free to appoint officers not municipal, — such, for example, as a board of police commissioners in and for a city, — yet that it was restrained by the above mentioned provisions, especially by the one last quoted, from itself directly appointing municipal officers whose duties and

none exists. *Coles v. Madison County*, Breese (Ill.), 115; *Holliday v. People*, 5 Gilm. (10 Ill.) 216; *Conner v. Bent*, 1 Mo. 235; *Rankin v. Beaird*, Breese (Ill.), 123; *post*, sec. 62. Effect of executive *pardon on fines* going to county. *Holliday v. People*, 5 Gilm. (10 Ill.) 216.

<sup>1</sup> *People v. Hurlbut*, 24 Mich. 44 (1871); s.c. 9 Am. Rep. 108. The distinction mentioned in the text is there accurately drawn, and clearly stated and illustrated in the admirable opinion of *Campbell*, C. J. It is approved and applied in *Chicago v. Wright*, 69 Ill. 326 (1873); *People v. Draper*, 15 N. Y. 543, *Denio*, J.; *Re Woolsey*, 95 N. Y. 135; *Astor v. New York*, 62 N. Y. 567. The text is cited and applied in *Britton v. Steber*, 62

Mo. 370 (1876). See and compare *People v. Lynch*, 51 Cal. 15 (1875); s.c. 15 Am. Rep. 677; *Schumacher v. Toberman*, 56 Cal. 508. Opinion of *McKinstry*, J., and of *Cooley*, J., in *People v. Detroit*, 28 Mich. 228; s.c. 15 Am. Rep. 202. Text approved. *Burch v. Hardwick*, 30 Gratt. 24; *U. S. v. Memphis*, 97 U. S. 284. *Post*, secs. 72, 74 a; *People v. Curley*, 5 Col. 412; *State v. Hunter*, 38 Kan. 578 (metropolitan police act giving the city council power to appoint a board of police commissioners held constitutional); *infra*, sec. 60; *Hathaway v. New Baltimore*, 48 Mich. 251; *State v. George*, 23 Fla. 585 (1887); *ante*, secs. 19, 22, 28. See chapter on Corporate Officers, *post*.

authority were plainly and exclusively local, such as the board of water commissioners and board of sewer commissioners for a particular city.<sup>1</sup>

§ 58 a. **Same subject.**—The Constitution of New York<sup>2</sup> provides that *municipal officers shall be elected by the electors of the municipality, or appointed by the authorities thereof*. The purpose of this provision is to secure to the political and municipal divisions of the State the right of *local self-government*, and to prevent the legislature from depriving the inhabitants of the several counties, cities, towns, and villages of the right to choose their officers.<sup>3</sup> The Supreme Court of Indiana has sustained the right of local self-government

<sup>1</sup> *People v. Hurlbut*, *supra*, distinguished from *People v. Mahaney*, 13 Mich. 481; *ante*, sec. 9, and notes. In *People v. Detroit*, 28 Mich. 228 (1873); s. c. 15 Am. Rep., *The People v. Hurlbut* is explained, and its doctrine adhered to, and it was held that *the board of Park Commissioners for Detroit*, selected by the legislature without its consent, were not the officers or representatives of the city. *Infra*, secs. 72-74 a. So, under the Constitution of *Kentucky*, which contains a provision that "officers of towns and cities shall be elected for such terms, and in such manner, and with such qualifications, as may be prescribed by law," and "shall reside within their respective districts," it was held that *the legislature could not authorize the governor to appoint municipal officers*, since the Constitution requires that they shall be elected by the voters of the town or city: *Speed v. Crawford*, 3 Met. (Ky.) 207 (1860); but it was also likewise held that it was within the power of the legislature to pass an act depriving the mayor and council of a designated city of the power to elect the *police* force thereof, and establishing, instead, a *board of police for the city and the county* in which the city was situate, to be elected by the qualified voters of the city and county, and that this board, thus elected, should select and enroll the permanent police force of the city, which, it was provided should be taxed to pay them. *Police Commissioners v. Louisville*, 3 Bush (Ky.), 597 (1868). See *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673. *Infra*, secs. 60, 72-74 a.

<sup>2</sup> Art. x. sec. 2.

<sup>3</sup> *People v. Albertson*, 55 N. Y. 50 (1873), criticising *People v. Draper*, 15 N. Y. 532; and *People v. Shepherd*, 36 N. Y. 285; *People v. Bull*, 46 N. Y. 57; *People v. McKinney*, 52 N. Y. 374 (1873), overruling *People v. Batchelor*, 22 N. Y. 128. And see *People v. Palmer*, 52 N. Y. 83 (1873); *People v. Clute*, 50 N. Y. 451 (1872); *ante*, sec. 9, and note. The legislature may, notwithstanding the constitutional provision mentioned in the text and others, provide for the improvement of city streets through commissioners appointed by legislative act, instead of being chosen by the municipal authorities. *Re Woolsey*, 95 N. Y. 135; *Astor v. New York*, 62 N. Y. 567. *Infra*, sec. 74, note. It is otherwise under the Constitution of California. *People v. Lynch*, 51 Cal. 15; *Schumacher v. Toberman*, 56 Cal. 508. Concerning the general inquiry how far right of local government and municipal self-regulation, including the right of the local citizens to select local officers, is rooted in our American Constitutions, the reader will find the opinion of *Cooley, J.*, in the *People v. Detroit*, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202, in connection with the opinions in *The People v. Hurlbut*, 24 Mich. 44 (1871); s. c. 9 Am. Rep. 103, highly instructive. See *ante*, chap. i. where the subject is viewed in its general historical aspects. In Indiana, see *State v. Denny* (two cases), 21 Northeastern Rep. 252 and 274; *Evansville v. State*, 21 Northeastern Rep. 267. *Post*, secs. 72-74 a.

in that State in opinions of marked ability, vigor, and learning, which hold to be unconstitutional two acts of the legislature which deprived certain classes of municipalities of the usual rights of municipal control and local regulation.<sup>1</sup> It has elsewhere been held, however, that administrative agencies and officers, such as police boards, and even boards of water commissioners, park commissioners, &c., may, in the absence of special constitutional limitation, be authorized by the legislature to assist in local or municipal administration.<sup>2</sup>

§ 59. **Same subject.** — Recognizing and applying the distinction in the preceding section between *State officers and municipal officers*, the Supreme Court of Missouri held that *the mayor of a city was not an officer under the State*, within the meaning of a constitutional provision, giving the Supreme Court jurisdiction only when title to an office under the *State* is in contest.<sup>3</sup>

<sup>1</sup> In *The State v. Denny* (Ind. 1889), 21 *Northeastern Rep.* 252, an act of the legislature creating a board of public works and affairs for cities having 50,000 inhabitants, to consist of three members selected from the two leading political parties, and to be *appointed by the legislature*, and giving to such board exclusive power and jurisdiction over streets, alleys, sewers, water supply, and lights, was held unconstitutional, as infringing the right of local self-government vested in the people of such cities. In *Evansville v. State* (Ind. 1889), 21 *Northeastern Rep.* 267, and *The State v. Denny, Mayor*, *Id.* 274, an act creating metropolitan police and fire boards for cities having over 29,000 inhabitants, provided that no persons should be eligible as commissioners of the police board unless they had resided in the respective cities for five years, and that the officers and employees of the police board should be selected from the two leading political parties. It was held that these provisions as to residence and politics were repugnant to Art. 1, sec. 23 of the Constitution of Indiana, prohibiting the legislature from granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not belong equally to all citizens. The act also gave to the boards, whose members were to be selected by the legislature, supreme and exclusive control over the fire and police departments, and

of the property of the city used in them, as well as of the purchase of supplies for them. It was held void as being an attempt to deprive the people of the cities affected by the act of the right of local self-government. *Ante*, secs. 9, 11, 45, and note; *post*, sec. 183.

<sup>2</sup> *County Court v. Griswold*, 58 Mo. 175, 198 (1874); *People v. Draper*, 15 N. Y. 532; *Daily v. St. Paul*, 7 Minn. 390, following *People v. Draper*. See *People v. Albertson*, 55 N. Y. 50 (1873), where *People v. Draper* is questioned and distinguished. *State v. Valle*, 41 Mo. 29; *State v. St. Louis County Court*, 34 Mo. 546. Limitations on the right suggested. *People v. Detroit*, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202.

<sup>3</sup> *Britton v. Steber*, 62 Mo. 370 (1876). A State officer may be connected with some of the municipal functions, but he must derive his powers from a State statute, and execute his powers in obedience to a State law. *State v. Valle*, 41 Mo. 29. Aldermen and common councilmen are considered "civil officers" within the meaning of the provisions of the Constitution of *Rhode Island* relating to the qualifications of voters. *In re The Newport Charter*, 14 R. I. 655. Water committee with statute authority to construct and manage the water-works of a city, was held to be agents, and not "officers," within the meaning of the constitutional

§ 60 (34). **Same subject. — Police Officers; Mode of Appointment.** — And it has been several times determined that the legislature may, unless specially restricted in the Constitution, *take from a municipal corporation its charter powers respecting the police and their appointment*, and by statute itself directly provide for a permanent police for the corporation, under the control of a board of police not appointed or elected by the corporate authorities, but consisting of commissioners named and appointed by the legislature. Police officers are in fact State or public officers, and not private or corporate officers. And a provision in such a law, transferring to such commissioners, for the purposes of the new police, the use of the police-telegraph, station-houses, watch-boxes, &c., provided by the corporation, is valid since it only takes city property dedicated to a particular use and applies it to the same purpose, changing only the agency by which the use is directed; the property is still the city's.<sup>1</sup>

provision that the legislature "shall not create any *office*, the term of which shall be longer than four years." But a provision in the Constitution of Connecticut prohibiting an increase of the compensation of *any public officer* during his term, is violated by a resolution of the common council to pay compensation to a committee of the council who were entitled to no salary, for customary services rendered during the year. *Garvie v. Hartford*, 54 Conn. 440; *David v. Portland Water Committee*, 14 Oreg. 98.

<sup>1</sup> *Baltimore v. Board of Police* (affirming validity to the Baltimore Police Bill), 15 Md. 376 (1859). There is nothing in the maxim that "Taxation and representation go together," that can preclude the legislature from establishing in a city a *metropolitan police board*, with power to estimate the expenses of the police, and compelling the city authorities to raise by taxation the amount so estimated. Every city is represented in the State legislature; and it is for that body to determine how much power shall be conferred by the municipal charters which it grants. *People v. Mahaney*, 13 Mich. 481; see also same principle, *People v. Draper*, 15 N. Y. 532 (1857), where the act to establish the metropolitan police district was held constitutional. But see *People v. Albertson*, 55 N. Y. 50 (1873), where *People v. Draper* is questioned and distinguished,

and *People v. Shepherd*, 36 N. Y. 287, is doubted; *People v. McDonald*, 69 N. Y. 362 (1877); *People v. Detroit*, 28 Mich. 228, 236; *People v. Chicago*, 51 Ill. 17. Text approved. *Burch v. Hardwick*, 30 Gratt. 24; *Police Comm'rs v. Louisville*, 3 Bush, 597; *Diamond v. Cain*, 21 La. An. 309 (1869); *State v. Leovy*, 21 La. An. 538; *ante*, sec. 58 n. The cases concur in holding that *police officers* are, in fact, State officers and not municipal, although a particular city or town be taxed to pay them. *Post*, sec. 210, and chap. xxiii. *Cooley, Taxation* (2d ed.), 681. An act which makes the mayor and aldermen of a corporation *commissioners of the court-house and jail* may be repealed by the legislature, and these buildings placed under the control of county or other officers. *State v. Mayor, R. M. Charl.* (Ga.) 250; see also *State v. Dews, R. M. Charl.* 397. A grant to a city to aid in building a *court-house*, and for educational purposes, is subject, until executed, to legislative resumption and control. *Bass v. Fontleroy*, 11 Texas, 698. In the absence of constitutional restriction the legislature may *directly appoint officers* to act within the municipality. *Hudson, &c. Co. v. Seymour* (highway commissioners), 6 Vroom, 35 N. J. L. 47. Many of the recent Constitutions contain prohibitions against such appointments. See for example Const. of California 1879, Art. xi. secs. 12-14.

§ 61. **Same subject.—Mode of Payment.** In the absence of special constitutional restriction it is competent likewise to the legislature of a State to enact that *the county* shall pay a portion of the *expenses of a police force in a city* situated wholly within, and forming part of the county. Police officers really execute public or State as distinguished from corporate duties. It may even direct a county to appropriate part of its revenue already collected in this way, since such legislation is not unconstitutional, as being retrospective in its operation, or as taking away vested rights, or impairing the obligation of contracts, or violating the principles of taxation. As moneys acquired by taxation are not strictly the private property of the county, such legislation is not the application of private property to public use without compensation, since the police board, by virtue of the act creating it, was an agency of the State government and performed public duties.<sup>1</sup> Such is the legislative power over counties and their property paid for by taxation that the General Assembly may constitutionally enact a law to take railroad stock from the county after it has been subscribed and paid for out of funds raised by taxation, and transfer it to those from whom the money was collected, and, in the event they do not apply for it, to vest it in townships for school purposes.<sup>2</sup>

*Infra*, sec. 74 a. So held in Indiana. *State v. Denny*, 21 Northeastern Rep. 252; *Evansville v. State*, *Ib.* 267; *State v. Denny*, *Ib.* 274.

The management and mode of electing trustees of an *incorporated academy*, which is endowed *entirely by the State*, may be changed by the legislature at its pleasure. *Dart v. Houston*, 22 Ga. 506; see also *University of North Carolina v. Maultsby*, 8 Ired. Eq. 257; *University of Alabama v. Winston*, 5 Stew. & Port. 17; *Louisville v. University of Louisville*, 15 B. Mon. 645; *Visitors, &c. v. State*, 15 Md. 330; *Regents v. McConnell*, 5 Neb. 423 (1877).

<sup>1</sup> *State, ex rel. St. Louis Police Comm'rs v. St. Louis County Court* (mandamus), 34 Mo. 546 (1864); *contra*, *Mayor, &c. v. Tows*, 5 Sneed (Tenn.), 186. The view of the Supreme Court of Missouri is undoubtedly the correct one. *Approved. St. Louis v. Shields*, 52 Mo. 351 (1873); *People v. Morris*, 13 Wend. 325; *Sangamon Co. v. Springfield*, 63 Ill. 66; *Weymouth, &c. Fire Dist. v. County Comm'rs*, 103 Mass. 142; *Stilz v. Indianapolis*, 55 Ind. 515.

*The maintenance of a police force may*

be committed to the corporate authorities of a municipality, and if there are no special constitutional restrictions on the power of the legislature, it may authorize the assessment of a tax upon the keepers of saloons and restaurants in the municipality for the purpose of maintaining such police force therein, to be levied and collected as other taxes. *Durach's Appeal*, 62 Pa. St. 491 (1869); *post*, secs. 746, 750, 793; *Railroad Co. v. Adler*, 56 Ill. 344 (1870).

*School districts* being public corporations, under legislative control, a law providing that school debts may be paid in bills of the State bank of the State, is valid as against the objection that the legislature had no power to direct that anything except gold and silver should be received in payment of debts. *Bush v. Shipman*, 4 Scam. (5 Ill.) 190.

A municipal corporation may constitutionally be *exempted from prospective liability* for non-feasance of its officers or liability for torts. *Gray v. Brooklyn*, 10 Abb. Pr. R. N. s. 186; *post*, chap. xxiii.

<sup>2</sup> *Lucas v. Tippecanoe Co.*, 44 Ind. 524

§ 62 (35). **Legislative Power over Revenues.**—The legitimate authority of the legislature over municipal corporations extends to *making provisions concerning their funds and revenues*,<sup>1</sup> and the authority is not abridged because the purpose to which the revenue is to be appropriated is specified in the charter; and the ground of the doctrine is that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes. Thus, the legislature may repeal the power it had given to cities to grant licenses for the sale of intoxicating liquors, although the money to be derived from the sale of such licenses was directed to be appropriated to the support of paupers within the city.<sup>2</sup> Such an authority, it was remarked, “gives the city no more a vested right to issue licenses, because the legislature specified the objects to which the money should be applied, than if it had been put into the general fund of the city.”<sup>3</sup>

(1873); *Downey, Worden, and Osborn, JJ.*, concurring, *Buskirk and Pettit, JJ.*, dissenting. The opinions are elaborate, and refer to the leading authorities on the subject. The dissenting judges consider *Spaulding v. Andover*, then recently decided by the Supreme Court of New Hampshire, as strongly sustaining their views. In the *Board of Comm'rs of Tippecanoe County v. Lucas, Treasurer*, the Supreme Court of the United States, 93 U. S. 108 (1876), was of the opinion, as counties were mere agencies of government whose powers may be changed at pleasure, that revenues raised by taxation, although levied for specific public purposes, are so far subject to the legislature that it may direct them to be applied to other uses of the municipality; and, therefore, that it was competent for the legislature to direct restitution to the taxpayer of property exacted from him by taxation in whatever form the property may have been changed, so long as it remained in the possession of the municipality.

<sup>1</sup> *Ante*, secs. 57, 60, 61, and notes.

<sup>2</sup> *Gutzwiller v. People*, 14 Ill. 142 (1852); *ante*, sec. 54, note.

<sup>3</sup> *Gutzwiller v. People*, 14 Ill. 142, (1852), *per Caton, J.* See, also, *Richland Co. v. Lawrence Co.*, 12 Ill. 1 (1850); *adhered to, Sangamon Co. v. Springfield*, 63 Ill. 71 (1872); *Spaulding v. Andover* (full discussion by *Foster, J.*), 54 N. H. 38 (1871); *Home Ins. Co. v. City Council*,

93 U. S. 116 (1876); *People v. Supervisors*, 50 Cal. 561; *People v. Power*, 25 Ill. 187; *Richmond v. Richmond, &c. Railroad Co.*, 21 Gratt. (Va.) 604 (1872), holding that the State may *exempt property from municipal taxation*. By the charter of a municipal corporation there was granted to it sole power to grant licenses to sell spirituous liquors within its limits, and to appropriate the money arising therefrom to city purposes. Subsequently the legislature passed an act directing the money thus raised to be paid by the corporation to an academy located within the town. The municipal corporation refused to pay over to the academy an amount received for licenses after the passage of the last-named act, and the academy brought an action to recover it. The court held the subsequent act to be unconstitutional, and that the town was not liable. The court were of opinion, that, by its charter, the town had a vested right in the profits arising from licenses. It admitted that the legislature might altogether take away from the town the power to grant licenses; but if it allowed the power to remain, it denied the right of the legislature “to make a different disposition of the funds arising from such licenses from that contained in the charter, unless with the consent of the corporation.” *Trustees of Aberdeen Academy v. Aberdeen*, 13 Sm. & M. (21 Miss.) 645 (1850). See, also, *Aberdeen v. Saunderson*, 8 Sm. & M. 663. The



§ 63 (36). **Legislative Power over Municipal Charters.** — Legislative acts respecting the political and governmental powers of municipal corporations not being *in the nature of contracts*, the provisions thereof may be changed at pleasure where the *constitutional rights of creditors* and others are not invaded.<sup>1</sup> By act of the legislature the separate city of Lafayette was added to and incorporated with the city of New Orleans, with a provision that the added district, which was *less in debt* than the city of New Orleans, should be charged only with its own debts; and by a *subsequent* act of the legislature it was provided that taxes should be equal and uniform throughout the entire limits of the city; the effect of which was to increase the amount of taxes to be raised within that portion of the corporation which was formerly the city of Lafayette. A bill was filed by residents and property owners of the annexed district to enjoin the collection of the excess of taxes beyond the amount fixed by the act incorporating the annexed district into the "old city," claiming that the act was a contract, and the levy of taxes under the latter act, so far as regards debts due antecedently to the annexation, violated the vested rights of the inhabitants of the annexed district. The Supreme Court, on the ground that public corporations are wholly under the control of the legislature, which has the power to provide in what manner taxes shall be levied for their support, and how their debts shall be paid on their dissolution, held the act authorizing increased taxation to be valid, and dismissed the bill.<sup>2</sup> So

doctrine that the town corporation had a vested right in profits arising from licenses cannot, we think, be sustained, and is not in harmony with the decisions elsewhere. *Indianapolis v. Indianapolis Home, &c.*, 50 Ind. 215 (1875).

*City, county, and township funds are under legislative control.* *County v. State*, 11 Ill. 202; *County v. County*, 12 Ill. 1; *Dennis v. Maynard*, 15 Ill. 477; *Love v. Schenck*, 12 Ired. Law, 304; *Love v. Ramsour*, *Id.* 328; *Youngs v. Hall*, 9 Nev. 212 (1874); *People v. Ingersoll*, 58 N. Y. 1; *People v. Fields*, 58 N. Y. 491 (1874); *Home Ins. Co. v. City Council*, 93 U. S. 116 (1876); *ante*, sec. 57, note; *Indianapolis v. Indianapolis Home, &c.*, 50 Ind. 215 (1875). The Indianapolis Home for Friendless Women is so far a public corporation or institution, that an appropriation by the legislature of fines, collected for the violation of certain city ordinances, to its support, is not the appropriation of money to a private purpose (*Lucas*

*v. Board, &c.*, 44 Ind. 524); *Indianapolis v. Indianapolis Home, &c.*, 50 Ind. 215 (1875).

<sup>1</sup> *Smith v. Inge*, 80 Ala. 283. Rights of creditors of municipal corporations, see *post*, sec. 68 *a*, chaps. vii. viii. and xiv. As to constitutional rights of creditors, mortgagees, contractors with and shareholders, of *private* corporations, as against the legislative power of the State, see opinion *Ruger, C. J.*, in *People v. O'Brien*, 1888, known as the *Broadway Surface Railway Case*, 111 N. Y. 1. *Infra*, sec. 68 *a*.

<sup>2</sup> *Layton v. New Orleans*, 12 La. An. 515 (1857). See, also, *Girard v. Philadelphia*, 7 Wall. 1 (1868); *People v. Hill*, 7 Cal. 97 (1857); *post*, chap. viii.; *State v. Flanders*, 24 La. An. 57; *U. S., ex rel. Brown v. Memphis*, 97 U. S., 300; *Vance v. Little Rock*, 30 Ark. 435, 439; *Hawkins v. Jonesboro*, 63 Ga. 527; *Sedgwick Co. v. Bailey*, 11 Kan. 631 (1873); *San Francisco v. Canavan*, 42 Cal. 541 (1872). A statute extinguishing one corporation

where, *after* a contract for paving streets had been made, but before it was fully executed, certain wards were added to the city (in which wards, however, no part of the paving was ever done), and no provision as to the debts of the corporation was made in the act of annexation, it was held that the legislature might afterwards constitutionally enact, as against the contractor, that the people within the wards thus added should not be taxed to pay any part of the debt of the city contracted prior to the passage of the act by which they were brought within the limits of the corporation.<sup>1</sup> And the same principle was asserted by the Supreme Court of the United States, which held to be valid a legislative act by which the city of Carrollton was annexed to New Orleans, with a provision that the latter city should succeed to all the rights and property, and assume and pay all of the debts of the former.<sup>2</sup>

§ 64 (37). **Same subject.** — The power of the legislature *to alter and abolish municipal corporations*, to erect new corporations in the place of the old, to add to the old, or to carve out of the old a new corporation, or the power to divide and dispose of the property held by such corporations for municipal purposes, is not defeated or affected by the circumstance that the corporation is, by its charter, made the *trustee of a charity, or of other private rights and interests*. Where the legal existence of the municipal trustee is destroyed by legislative act, the Court of Chancery will assume the execution of the trust, and, if necessary, will appoint new trustees to take charge of the property and carry into effect the trust.<sup>3</sup>

and throwing its obligations on another raises an implied promise on the part of the successor to pay the same. *Little v. Union Township Committee*, 40 N. J. L. 397. *Post*, secs. 170, 186–189.

<sup>1</sup> *United States, ex rel. Brown v. Memphis*, 97 U. S. 300 (1877). Further as to effect of dissolution and of change of boundaries, see *post*, sec. 68 *a*; chaps. vii. and viii. In town of Flatbush, *In re*, 60 N. Y. 398 (1875), the court of appeals expressed the opinion that it was beyond the competency of the legislature to assess lands in the town of Flatbush to pay debts previously incurred by the adjoining city of Brooklyn under prior acts for a park, although the portion of the park was carved out of the corporate limits of Flatbush. *Miller, J.*, after stating that had an original assessment for benefits been made it might be said to be an as-

essment for public use, and enforceable as such, says: "But such is not this case. . . . There is no principle that I am aware of which sanctions the doctrine that it is within the taxing power of the legislature to *compel one town, city, or locality to contribute to the payment of the debts of another*. The government has no such authority, and this case is entirely without a precedent. If such assessments were authorized they might not be limited to adjoining towns, cities, or villages, but applied to those located at great distances from each other. Such legislation would be unjust, mischievous, and oppressive, and cannot be tolerated."

<sup>2</sup> *New Orleans v. Clark*, 95 U. S. 644 (1877). Such legislation is not within the prohibition of the State Constitution against the passage of retroactive laws. *Id.*

<sup>3</sup> *Girard v. Philadelphia*, 7 Wall. 1

§ 65 (38). **Legislative Power not wholly Unlimited.**—The supremacy of the *legislative authority over municipal corporations is not, however, in all respects, unlimited*; but the limitations must be sought either in the national or State Constitution; and except as there found, in terms or by fair implication, they do not exist. In England it is settled that the *Crown* has no power, without the consent of those to be affected thereby, to alter or abolish municipal charters, or to impose new ones on the corporation. But *Parliament* may create new corporations, or abolish or alter charters, or impose new ones, at its will, and without the consent of the inhabitants. And so may the State legislatures in this country, if there be no constitutional restriction upon the power.<sup>1</sup>

§ 66 (39). **Public and Private or Proprietary Rights distinguished.**—It assists to an understanding of the extent of legislative power over municipal corporations proper (incorporated towns and cities) to observe that these, as ordinarily constituted, possess a double character: the one *governmental, legislative, or public*; the other, in a sense, *proprietary or private*. The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, or officers in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability.<sup>2</sup> In *its governmental or public character*, the corpora-

(1868); *Meriwether v. Garrett*, 102 U. S. 472, 528 (1880); *Philadelphia v. Fox*, 64 Pa. St. 169 (1870); *infra*, secs. 74 a, 80, *Montpelier v. East Montpelier* (division of town, and contest as to trust property held for the benefit of the inhabitants of the original township), 29 Vt. (3 Wms.) 12 (1856); same controversy at law, 27 Vt. 704. See *infra*, sec. 80, and chapters on Corporate Property and Remedies against Illegal Corporate Acts, *post*. Text approved. *Luehrman v. Tax. Dist.*, 2 Lea (Tenn.), 425; *Ellerman v. McMains*, 30 La. An. 190; *infra*, sec. 68; *Cincinnati v. Cameron*, 33 Ohio St. 336.

<sup>1</sup> *St. Louis v. Allen* (extension of city limits), 13 Mo. 400 (1850); *St. Louis v. Russell*, 9 Mo. 503 (1845). *Ante*, sec. 54. It is justly observed, that "most, if not all, of the leading cases in the books, involving the question of the inviolability of municipal charters, in the *English*

courts, arose between the *prerogative of the crown* and the *corporation*. The right or power of *parliament* in England, or of the legislature here, would present (and was decided to present) quite a different question." *Per Nelson, J.*, in *People v. Morris*, 13 Wend. 325, 334 (1835); *Philadelphia v. Field*, 58 Pa. St. 320 (1868); *Hudson County v. Seymour*, 6 Vroom (35 N. J. L.), 47; *People v. Bennett*, 29 Mich. 451 (1874); s. c. 18 Am. Rep. 107; *Austin v. Coggeshall*, 12 R. I. 329, citing and approving text.

<sup>2</sup> *Ante*, secs. 22, 25, 28. "The distinction is well established between the responsibilities of towns and cities for acts done in their *public capacity*, in the discharge of duties imposed on them by the legislature for the public benefit, and for acts done in what may be called their *private character*, in the management of property and rights voluntarily held by them

tion is made, by the State, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the State rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the Constitution of the particular State. But *in its proprietary or private character*, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the compact community which is incorporated as a distinct *legal personality* or *corporate individual*; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it, is omnipotent.<sup>1</sup>

for their own immediate profit or advantage, as a corporation, although inuring, of course, ultimately to the benefit of the public." *Per Gray, J.*, in *Oliver v. Worcester*, 102 Mass. 489, 499 (1869); *s. p.* *Detroit v. Corey*, 9 Mich. 165, 184 (1861); *Hill v. Boston*, 122 Mass. 344, 359; *s. c.* 23 Am. Rep. 332. In the one case, no private action lies unless it be expressly given; in the other, there is an implied or common-law liability for the negligence of their officers in the discharge of such duties. In further illustration of this dual character, the reader is referred to the cases cited in the next note. See reference to this section of the text in *Spaulding v. Andover*, 54 N. H. 38, 54 (1873); and in *Meriwether v. Garrett*, 102 U. S. 528; *post*, secs. 72-74 *a*, and chap. xxiii., and cases.

<sup>1</sup> *West Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 175; *Id.* 185; *Bailey v. Mayor, &c. of New York*, 3 Hill, 531; *People v. Fields*, 58 N. Y. 491; *People v. Ingersoll*, 58 N. Y. 1 (1874); *Maxmillian v. Mayor, &c. of New York*, 62 N. Y. 160 (1875); *People v. Briggs*, 50 N. Y. 553, 560 (1872); *Nichol v. Nashville*, 9 Humph. 252; *Small v. Danville*, 51 Me. 359; *Jones v. New Haven*, 34 Conn. 1;

*Western College v. Cleveland*, 12 Ohio St. 375 (1861); *Howe v. New Orleans*, 12 La. An. 481; *Martin v. Mayor, &c.*, 1 Hill, 545; *Buttrick v. Lowell*, 1 Allen, 172; *Oliver v. Worcester*, 102 Mass. 489 (1869); *Touchard v. Touchard*, 5 Cal. 306; *Gas Co. v. San Francisco*, 9 Cal. 453; *Commissioners v. Duckett*, 20 Md. 468; *Weet v. Brockport*, 16 N. Y. 161, note; *Louisville v. University of Louisville*, 15 B. Mon. 642; *Louisville v. Commonwealth*, 1 Duvall (Ky.), 295; *Weightman v. Washington*, 1 Black (U. S.), 39 (1861); *Reading v. Commonwealth*, 11 Pa. St. 196 (1849); *Richmond v. Long's Admr.*, 17 Gratt. (Va.) 375; *De Voss v. Richmond*, 18 Gratt. 338; *s. c.* 7 Am. Law Reg. (N. S.) 589; *New Orleans, &c. R. Co. v. New Orleans*, 26 La. An. 478; *s. c.* *Id.* 517 (1874); *Askew v. Hale Co.*, 54 Ala. 639; *Detroit v. Corey*, 9 Mich. 165, 184 (1861); *People v. Hurlbut*, 24 Mich. 44 (1871), opinion of *Cooley, J.*; *s. c.* 9 Am. Rep. 103; *People v. Detroit*, 28 Mich. 228 (1873); *s. c.* 15 Am. Rep. 202. *In re Malone's Estate*, 21 S. C. 435. As to what are municipal duties, and what falls within the scope of municipal powers, see *United States v. Baltimore & Ohio Railroad Co.*, 17 Wall. 332 (1872); *post*,

§ 67. **Same subject.** — This division of the powers of a municipal corporation into two classes, one public and the other private, has been before alluded to, and is well established, but the *private* character thus ascribed to such powers it is difficult exactly to define. It is easy to understand that if under the exercise of lawful powers by the authority of the legislature, property has been acquired by a municipality, such property may not be subject to legislative appropriation to uses distinctly foreign to the interests of the municipality; but in what sense are powers conferred and to be exercised for the good of all the people of the place private? Wherein do such powers, in their origin or nature, differ from those admitted to be public? Are not all powers conferred upon municipalities, whether many or few, given, and given only, for their better regulation and government, and to promote their welfare as parts of the Commonwealth? The small municipality, with few and simple powers, is no more completely under the supreme dominion of the legislature than the more populous one, requiring for its proper government organs and powers peculiar to itself. Are the latter, therefore, *private*? If so, it must be in a qualified and peculiar sense.<sup>1</sup> Contracts in favor of the creditor are protected by the national Constitution; but as against a State, the difficulty is to find a logical and sound basis on which to rest private rights in favor of a municipality, if, under the Constitution of the particular State, it is within the power of the State which breathed into it the breath of life utterly to extinguish its existence at pleasure. The distinction originated with the courts, to promote justice, and has been most frequently applied to escape technical difficulties in order to hold such corporations liable to private actions.<sup>2</sup> The distinction, how-

sec. 775 *et seq.*; *Niles Water Works v. Niles*, 59 Mich. 311. On the ground that legislation concerning municipal corporations is of a peculiar character on account of their being agencies of the government, the Court of Appeals of *Kentucky* held that a charter provision *limiting the right to bring actions to recover money improperly paid for taxes to six months*, when the general statute of limitations allowed five years in such cases, was not unconstitutional for granting a special privilege. *Covington v. Hoadley*, 83 Ky. 444.

<sup>1</sup> *Ante*, secs. 25, 26.

<sup>2</sup> Section approved in *State, ex rel. v. Smith*, 44 Ohio St. 348. On this subject the opinion of Chief-Justice *Denio*, in *Darlington v. Mayor, &c.*, 31 N. Y. 164

(1865), may be read with profit. The Chief-Justice there asserts the unlimited power of the legislature over municipal corporations and their property. He maintains that such corporations are altogether public, and all their rights and powers public in their nature, and that their property, though held for income or sale, and unconnected with any use for the purposes of the municipal government, is under the control of the legislature, and not within the provisions of the Constitution protecting private property. He denies the correctness of the distinction taken in *Bailey v. The Mayor, &c. of New York*, 3 Hill, 531, and other cases, *between the public and private functions* of city governments, and maintains that, as respects

ever, is generally recognized, and it may be invoked as the basis of property rights in favor of the municipality which are not wholly withdrawn from the protection that our Constitutions extend to property.<sup>1</sup>

§ 68 (40). **Same subject.** — It is, perhaps, at present, impossible to define with precision what *limitations exist upon the power of the legislature* over municipal corporations, as ordinarily constituted. It is practicable only to refer to the leading cases upon the subject, and attempt to extract the principles upon which they rest.

It is decided that a grant by the legislature of the State to a town of the *right to establish a ferry is not in the nature of a contract*; hence the grant is repealable, and the corporation may constitutionally be deprived of the franchise.<sup>2</sup> So the powers conferred by the legislature upon a municipality *in respect of wharves and wharfage* may be revoked by it at pleasure if it does not touch property acquired by the municipality under the sanction of the legislature.<sup>3</sup> An act conferring upon a municipal corporation a *public trust*, and

the State, all their powers and functions are public. He affirms that the legislature may compel a municipal corporation to submit to arbitration claims as to which private corporations and natural persons would be entitled by the Constitution to a trial by jury. The opposite view is nowhere more ably presented than by *Campbell, C. J.*, in *The People v. Hurlbut*, 24 Mich. 44 (1871); s. c. 9 Am. Rep. 103, and by *Cooley, J.*, in *People v. Detroit*, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202; *Gray v. Brooklyn*, 10 Abb. Pr. Rep. N. S. 186; *post*, chap. xxiii. See as to jury, *Dunsmore's Appeal*, 52 Pa. St. 374. Consult on this subject *Plimpton v. Somerset*, 33 Vt. 233 (1860). See also chapters on Municipal Courts, Property, and Ordinances, *post*.

<sup>1</sup> See *ante*, sec. 3 a; *post*, secs. 68 and note 68 a, 69, as to the *rationale* and grounds of the distinction.

<sup>2</sup> *East Hartford v. Hartford Bridge Co.*, 10 How. 511 (1850); s. c. 16 Conn. 149; 17 Conn. 79; *Trustees v. Tatman*, 13 Ill. 30; *Police Jury v. Shreveport*, 5 La. An. 661 (1850); *Darlington v. Mayor*, 31 N. Y. 164, 202, 203, *per Denio, C. J.* *Post*, secs. 114-116.

<sup>3</sup> *Railroad Co. v. Ellerman*, 105 U. S. 166 (1881). "Whatever powers," says the Supreme Court of the United States,

by *Matthews, J.*, in *Railroad Co. v. Ellerman*, just cited (p. 172), "the municipal body [of New Orleans] rightfully enjoys over the subject [of wharves and wharfage] is derived from the legislature. They are merely administrative, and may be revoked at any time, *not touching, of course, any property of the city actually acquired in the course of administration.* The sole ground of the right of the city to collect wharfage at all is that it is a reasonable compensation, which it is allowed by law to charge for the actual use of structures provided at its expense for the convenience of vessels engaged in the navigation of the river. And while it may be true, as was decided by the Supreme Court of Louisiana, in *Ellerman v. McMains* (30 La. An. pt. 1, 190), that the city cannot lawfully be required to permit the use of its wharves, without compensation, on the ground that they are private property, it is equally true, as decided by the same court in *City of New Orleans v. Wolmot* (31 La. An. 65), that the city cannot forbid any water-craft from using the banks of the navigable waters of the State for the purposes of navigation and commerce, and cannot compel them to pay to it wharfage except for the use of wharves of which it is the proprietor." *Post*, chap. vi. secs. 103-113.

the *title to land* as ancillary to its execution, is not a contract, but may be repealed at the will of the legislature.<sup>1</sup> But suppose the legislature had granted in fee to the corporation a tract of land within its limits, is such a grant, or is an ordinary grant of land to the corporation from others, a contract *as respects the State*, and protected by the Constitution from legislative invasion, the same as if the grant had been made to, or the property acquired by, an individual or private corporation? The question thus stated has never arisen directly for adjudication in the Supreme Court of the United States; but, in the celebrated Dartmouth College Case, two of the judges expressed the opinion that the legislative control over public and municipal corporations was not so transcendent and absolute as to extend to an arbitrary divestiture of its private property and the destruction of rights of a private nature. On the other hand, it is the opinion of a distinguished and able judge in New York, in a case already mentioned, that the authority of the legislature over the powers, rights, and property of municipal and public corporations, is, as respects the corporations, quite without limit.<sup>2</sup> That property acquired and owned by a municipal corporation by legislative consent is not subject to an unlimited power of the legislature over it, is consonant with natural justice. The need of having property and of property rights is one of the main reasons why municipal corporations are created. This is strongly expressed by Savigny in respect of municipal corporations in ancient Rome.<sup>3</sup> If a municipal corporation, as representing a distinct community, be regarded as a *legal person*, the legislature in effect says to it, "You may at your own expense acquire property;" and if it acts on such

<sup>1</sup> *People v. Vanderbilt*, 26 N. Y. 287 (1863); *post*, sec. 114. Where an act incorporating a city donated lands included therein for the erection of certain public buildings, and the residue to be applied to education, and the charter was afterwards repealed, it was held that *until the trust had been executed* it was competent for the legislature to change or abolish it, and that the repeal of the charter extinguished the trusts, they being public, unexecuted, and conditional. *Bass v. Fontleroy*, 11 Tex. 698-708 (1854). Where an act of the legislature, instead of granting certain moneys received by the State for the purposes of internal improvements to certain counties absolutely, simply appropriated it to be drawn by such counties and expended by them in the improvement of roads, &c., it was held that before its expenditure by

the counties the legislature had entire control over the fund, and might resume or change the purposes for which it was originally designed to be expended, or provide for the payment by an old county, which had received, but not expended, its proportion of such fund, to a new county erected out of the old county, of an equitable share of the fund. *Richland County v. Lawrence County*, 12 Ill. 1 (1850), distinguished from *Hampshire v. Franklin*, 16 Mass. 76. *Post*, chap. viii.

<sup>2</sup> *Denio*, C. J., in *Darlington v. New York*, 31 N. Y. 164 (1865). See *post*, sec. 68 a.

<sup>3</sup> Savigny, *Jural Relations* (translated by Rattigan). sec. 85. "*Property Capacity is the essential quality of a Juristical Person*," i. e., a corporation. *Ib.* secs. 86, 87.

permission, the courts may, perhaps, fairly deduce a contract that the legislature, while it may regulate or change the uses of such property, will not deprive the corporation of it. Accordingly, the weight of opinion seems to be in favor of the doctrine that there may be, in such corporations, rights under contracts and grants which are beyond destruction by the legislature, though not beyond legitimate legislative authority and control;<sup>1</sup> but in the present state of

<sup>1</sup> In *Richland County v. Lawrence County*, 12 Ill. 1 (1850), while the plenary power of the legislature over the public, civil, or political rights of public corporations was asserted and declared, still it was admitted by the very able and cautious judge who delivered the opinion, that "the State may make a contract with, or a grant to, a public municipal corporation which it could not subsequently resume; but in such case the corporation is to be regarded as a private company." *Per Trumbull, J. Sangamon Co. v. Springfield*, 63 Ill. 66 (1872). See *West Sav. Fund Society v. Philadelphia*, 31 Pa. St. 175; *Id.* 185.

"But while the legislative power (to enlarge, restrain, or even destroy municipal corporations, as the public interest may require) may be exercised over public and municipal corporations, it has as uniformly been held *that towns, and other public corporations, may have private rights and interests vested in them under their charter; and as to those rights, they are to be regarded and protected the same as if they were the rights and interests of individuals or of private corporations*; and grants of property in trust for other than corporate and municipal use (that is, as we understand, for private, as distinguished from public, purposes) are no more the subject of legislative control than are the private and vested rights of individuals." *Per Isham, J., arguendo*, in *Montpelier v. East Montpelier*, 29 Vt. (3 Wms.) 12, 19 (1856); s. c. 27 Vt. 704.

*Legislative grants of property to private, and it seems, also, to public and municipal corporations, cannot be repealed so as to divest the rights of the grantees.* *Town of Pawlet v. Clark*, 9 Cranch (U. S.), 292, 336 (1815), *per Story, J., obiter*; *Terret v. Taylor, Id.* 43, 52. In this last case, Mr. Justice Story remarks, *arguendo*: "In

respect, also, to *public* corporations, which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, *securing, however, the property*, for the uses of those for whom and at whose expense it was originally purchased." Followed by Chancellor *Kent*, 2 Com. 305; by Mr. Justice *Washington*, *Dartmouth College Case*, 4 Wheat. 518, 663. In the last case, Mr. Justice *Story* said: "But it will hardly be contended, that even in respect to such [public] corporations, the legislative power is so transcendent that it may, at its will, *take away the private property of the corporation*, or change the uses of its private funds acquired under the public faith." 4 Wheat. 518, 694, *obiter*. And such is Mr. Justice *Cooley's* view in his valuable treatise, *Constitutional Limitations*, 238. He reiterates it in his learned opinion in *People v. Hurlbut*, 24 Mich. 44; s. c. 6 Am. Law Rev. 376 (1871); s. c. 9 Am. Rep. 103, and also in his elaborate judgment in the important case of *The People v. Detroit*, 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202; *Detroit v. Detroit & Howell P. R. Co.*, 43 Mich. 140. In *Grogan v. San Francisco*, 18 Cal. 590, Mr. Chief-Justice *Field*, delivering the opinion of the Supreme Court of California, takes the ground that the real estate or private property of a municipal corporation is protected by the clause in the national Constitution securing the inviolability of contracts; that all legislative authority over it must be exercised in subordination to this guaranty; and that it is subject to legislative control to the same extent, but no greater extent, than all other property in the State. But in *Darlington v. Mayor, &c. of New York*, 31 N. Y. 164, 193, 205, Mr. Chief-Justice *Denio* observes: "Let



the decisions the point cannot fairly be said to be settled. It has however been adjudged that the rights of the *city of New York* to

us suppose the city to be the owner of a parcel of land not adapted to any municipal use, but valuable only for sale to private persons for building purposes, or the like, no one, I think, can doubt but what it would be competent for the legislature to direct it to be sold, and the proceeds devoted to some municipal or other public purpose, within the city, as a courthouse, a hospital, or the like. . . . It is unnecessary to say whether the legislative jurisdiction would extend to diverting the city property to other public use than such as concerns the city and its inhabitants." And he considers the expression of Chancellor *Kent* (2 Com. 305) and of Mr. Justice *Story*, that where a municipal corporation is empowered to have and to hold private property, such property is invested with the security of other private rights, to mean only that it possesses such rights against wrong-doers, and not that it is exempt from legislative control. 31 N. Y. 164, 196.

Let us consider this interesting subject a moment longer. The city of New York is the owner of valuable real property in fee made by ancient grants, from which it derives large revenues. No one denies that the legislature may regulate or direct the uses of this property, provided it is not diverted from the municipality or appropriated to *extra-municipal* purposes. But could the legislature require it to be sold and the proceeds given to the city of Albany, or covered into the State treasury? The injustice of such an act is so striking that it suggests that it *must* be beyond the legislative power, even if there are no special limitations in the Constitution. The text (sec. 68) states a ground on which the denial of such a power in the legislature can be rested. A chartered municipality is certainly a distinct legal personality; and it is a familiar principle that property acquired by a corporation under its franchises is invested with all the attributes of property, although the franchises of such corporation may be absolutely subject to legislative control. Mr. Justice *Field*, *supra*, and *Ruger*, C. J., in *People v. O'Brien*, 111 N. Y.

1 (1888), express the opinion that the private property of municipalities and of corporations is protected by the *contract clause* of the Federal Constitution. Since the opinion of Mr. Justice *Field* was given, the Fourteenth Amendment has been adopted. It provides that no person shall be deprived of property without due process of law, and the property rights of private corporations are held by the Supreme Court of the United States to be within the Amendment. A compact body of people, such, for example, as the city of New York, have needs not common to the body of the State at large; hence, their incorporation with a distinct capacity to acquire and hold property for the use and benefit of this distinct body of people. It is their property. No reason suggests itself to us why their ownership, as against a total diversion of use, is not protected by the Fourteenth Amendment. See further, *infra*, secs. 68 a, 72, 73.

In two cases arising out of the *Tweed frauds in New York*, the conclusion was reached that, as between the State and the municipal corporation, the funds of the corporation owned and held for the public uses of the corporation are distinctively and exclusively the property of the corporation; and the opinion was expressed *arguendo* that such funds were invested with the security of other private property, subject to the plenary power of the legislature, as declared in *Darlington v. Mayor, &c. supra*, to direct their appropriation to any use or purpose for the benefit of the municipality or its inhabitants. *People v. Ingersoll*, 58 N. Y. 1 (1874); *People v. Fields*, 58 N. Y. 491 (1874). The exact point, however, which was adjudged in these cases is that, unless expressly given by statute, an action could not be maintained in the name of the State by the attorney-general, to recover a judgment for moneys of the county and city of New York, fraudulently taken by the defendants, as such right of action was exclusively in the municipality, which was the owner of moneys illegally appropriated. *Post*, chap. xxii.

*real estate which it owns in fee simple absolute*, under grants made to it in its ancient charters, which grants were confirmed by the Constitution of the State, are as indestructible by legislative act as are the like property rights of citizens; and, applying this principle, it was held, that the legislature had no authority to pass an act ordering the demolition of a reservoir, part of the water system of New York, built by the city at the expense of its citizens, upon property which it thus owned in fee simple and upon the demolition of such reservoir further enacting that the lands covered by it, together with other lands adjoining the same owned in like manner by the city, should be converted into, and maintained as one of the public parks of the city, except upon making compensation to the city therefor.<sup>1</sup>

<sup>1</sup> *Webb v. Mayor, &c. of New York*, 64 How. Pr. Rep. 10 (Supreme Court, special term, 1882). In giving the judgment of the court, *Macomber, J.*, after observing that the land in question was granted to the city in fee simple by the Dongan charter in 1686, and was also substantially embraced in the Montgomerie charter of 1730, which was confirmed by the colonial legislature in 1732, and by the Constitutions of New York of 1777, 1821, and 1846, says: "The lands in question, therefore, are owned by the city in fee simple absolute. [Citing *Furman v. New York*, 5 Sandf. (S. C.) 16; s. c. 10 N. Y. 567.] If, therefore, the legislature has undertaken by its acts to destroy the property of this corporation, or to deprive the city of its use, without just compensation, it has violated a fundamental law of the State. Chancellor *Kent* (*City Charter in Kent's Notes*), in commenting upon the provisions of the ancient charters of the city, says: 'It may not be amiss to state here, once for all, that it is an acknowledged and settled principle that no vested right of property, whether it belongs to private individuals or be in the shape of a corporate franchise, can ever be lawfully taken away without some default or forfeiture, to be ascertained by a fair trial and pronounced by judicial decree. The English statute of *Magna Charta* establishes as a great principle the sanctity of rights and privileges then existing, or thereafter to be lawfully procured; and that principle was intended to be of general and perpetual application. It provided that the city of London, and

all other cities, should have all their liberties and free customs; and that no freeman should be disseized of his freehold or liberties, or free customs, but by lawful judgment of his peers or by the law of the land. Corporate franchises in this country rest on a basis which ought to be at least as solid as *Magna Charta*, for they are founded on grants which are contracts, and "no State," says the Constitution of the United States, "can pass any law impairing the obligation of contracts."

"I perceive," continues *Macomber, J.*, "no difference between the tenure of property thus held by the city and the proprietary rights of natural persons or private corporations. This privilege, however, is peculiar in this State to the city of New York. [Not meaning by this to decide that property owned in fee simple absolute by other cities is not equally protected by the Constitution.]

"Nor is this property, with other real estate owned by the city, held in trust for any person; nor is it stamped with any mere political trust of which the city may be deprived, and thus its claim to the right to the possession of the property destroyed. The title to the land rests somewhere, and, as has been shown above, so far as the records extend, no one claims it except the city itself.

"It seems to me that the weight of authority is to the effect that the property which New York holds in its proprietary or private character, though originally derived from the power claiming the ultimate title, and which concerns the private advantage of the corporation, as a distinct

§ 68 a. **Same subject. Effect of Repeal or Dissolution.**—Where the *Constitution or laws have reserved to the legislature* absolute and unrestricted power to repeal the charters of private corporations and to dissolve them at will, the legislative supremacy over their existence would seem to be as complete as it is over that of municipal corporations; and by analogy the limitations on the legislative power over *the property and contract rights or other vested rights* of private corporations *throw light upon like questions* as respects municipal corporations. As to private corporations it can, we think, safely be affirmed that while the legislature may, under and pursuant to such reserved power, annul and dissolve them at pleasure, it is not within its competency, under the Federal Constitution as amended, or under like provisions in the Constitutions of the States, to impair or affect the property or property rights of the dissolved corporation, but only its *right to exist*, and such other rights as are *directly and necessarily dependent* on the continued existence of the corporation. The rights of mortgagees, of creditors generally, and rights arising under valid contracts with the corporation, survive the repeal and dissolution.<sup>1</sup> And the same doctrine, doubtless, applies

legal personality, is stamped with so many of the rights and powers of natural persons or private corporations as that the city cannot be deprived of this reservoir without due process of law and without just compensation. It admits of no doubt that the legislature may change, modify, enlarge, or restrain the powers of a corporation which it has created. But whenever this is done, and a municipal corporation is relieved of the privilege and duty of maintaining a jurisdiction over the property and property rights, care has invariably been taken to restore to the original owner or proprietor the rights which the municipal corporation were for a time permitted to exercise. *Terret v. Taylor*, 9 Cranch, 52; 2 Kent, Commentaries, 257; *Dartmouth College Case*, 4 Wheat. 694; *People v. Detroit*, 28 Mich. 228; *Bailey v. Mayor, &c. of New York*, 3 Hill, 531; *People v. Fields*, 58 N. Y. 591; *People v. Ingersoll*, Id. 1; *Maxmillian v. New York*, 62 N. Y. 160."

<sup>1</sup> *People v. O'Brien, Receiver* (Broadway Railway Case), 111 N. Y. 1 (1888); *Mumma v. Potomac Co.*, 8 Pet. 285; *Fletcher v. Peck*, 6 Cranch, 135; *Sinking Fund Cases* (arising under reserved power to amend or repeal Pacific Railway acts),

99 U. S. 700 (1878); *Greenwood v. Freight Co.*, 105 U. S. 13 (1881); *Detroit v. Howell Plank Road Co.*, 43 Mich. 140, 147.

*Broadway Surface Railway Case*: While the legislature of New York, under the power reserved in the Constitution "to alter or repeal," from time to time, laws under which corporations are formed, and under a general reserved power by statute that "all corporations shall be subject to alteration, suspension, and repeal in the discretion of the legislature," may annul or repeal the charter of a corporation or dissolve it; yet it cannot, by virtue of such an act, or any act, impair or affect the property or property rights of the corporation. *The extent and limits of legislative power over corporations* and their rights and the rights of their mortgagees, and of persons having contracts with the dissolved corporations, underwent the most thorough and deliberate consideration of the Court of Appeals of New York in *Broadway Surface Railway Case*. *People v. O'Brien, Receiver, et al.*, 111 N. Y. 1 (1888). In that case the Broadway Surface Railway Company was, in 1884, duly incorporated. It acquired from the municipal authorities the right to lay down

to property rights acquired by virtue of valid municipal grants;<sup>1</sup> and it has also been declared in respect of the property rights of municipalities, though as to this, the doctrine remains, perhaps, to be fully settled, defined, and its limitations ascertained by actual judicial judgments.<sup>2</sup> It is agreed by all the authorities that under the

tracks and to run cars over Broadway from the Battery to Fourteenth street. It was authorized by statute to mortgage its property and franchises, and also to make contracts with connecting railroad companies for the use of their tracks. It executed mortgages on its property and franchises to secure negotiable bonds, which were sold in the market. Afterwards it appeared to the legislature probable, if not certain, that the corporation acquired the right to occupy the streets by means of bribery of a majority of the board of aldermen; and this was the motive, doubtless, that led the legislature, in 1886, to repeal the charter of the Broadway Company, to dissolve the corporation, and to provide for winding up its affairs and disposing of and distributing its property. The opinion of the court, delivered by Ch.-Judge *Ruger*, discusses the interesting questions involved with learning and marked ability. The court held that the franchise of the corporation, under its charter, and the grants from the municipal authorities to lay down tracks and operate its railroad, *was a property right* which survived the dissolution of the corporation; so were the rights of the corporation under its contracts with connecting railroads, and also the rights of the mortgagees to the continued use of the street in connection with the railroad, under the municipal consent to the use thereof for railway purposes. The special provisions of the repealing act as to winding up the affairs of the dissolved corporation and disposing of and distributing its property, were held to be unconstitutional.

<sup>1</sup> *R. R. Co. v. Delamore*, 114 U. S. 501; *Langdon v. Mayor, &c.*, 93 N. Y. 129; *People v. O'Brien*, *supra*, and cases cited. Concerning rights acquired under municipal grants to others, *Ruger*, C. J., in *The People v. O'Brien*, *supra*, speaking of the grant by the corporation of New York City to the Broadway Surface Railway Company to use the streets of New York

for its railway, says: "Grants similar in all material respects to the one in question have heretofore been before the courts of this State for construction, and it has been quite uniformly held that they are grants in fee vesting the grantee with an interest in the street in perpetuity to the extent necessary for the purposes of a street railroad. *People v. Sturtevant*, 9 N. Y. 263; *Davis v. The Mayor, &c.*, 14 N. Y. 506; *Milhan v. Sharp*, 27 N. Y. 611; *Mayor v. Second Ave. R. R. Co.*, 32 N. Y. 261; *Sixth Ave. R. R. Co. v. Kerr*, 72 N. Y. 330. Other cases are also reported in the books, but it is deemed unnecessary to accumulate authorities on this point. . . . We are therefore of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway through its grant from the city under the authority of the Constitution and the act of the legislature. It is also well settled by authority in this State that such a right constitutes property within the usual and common signification of that word. *Sixth Ave. R. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 N. Y. 263. . . . It is, however, earnestly contended for the State that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the State. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this State have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally."

<sup>2</sup> *Mayor, &c. v. Second Ave. R. R. Co.*, 32 N. Y. 261. In this case *Brown*, J., said: "The rights of municipal corporations to property in lands and its usual incidents, and to create ferries and railroad franchises, are quite distinct and separate

power to repeal the charters of private corporations the legislature cannot take away property acquired under the operation of the charter;<sup>1</sup> and as to municipal corporations the only question is whether the legislature can deprive *them*, or rather, perhaps, their inhabitants, of their property. It is believed by the author, for the reasons suggested in this chapter,<sup>2</sup> that while the legislature has full

from their duties as legislatures, having authority to pass ordinances for the control and government of persons and interests within the city limits. The latter are powers held in trust, as all legislative powers are, to be used and exercised for the benefit and welfare of the whole community, while the former are property, in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and transfer property." The same learned judge said, in *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 364: "The grant to the City Railroad Company and its acceptance of the conditions annexed, with the duties and obligations and large expenditures resulting therefrom, would seem, therefore, to invest the company with the right of property in the franchise, of which it cannot be deprived without its consent or against its will."

<sup>1</sup> See cases cited in note 1 to this section. In *Detroit v. Howell Plank Road Co.*, 43 Mich. 140, 147, *Cooley, J.*, said: "It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary vocations of life, by gift or descent, or by making profitable use of a franchise granted by the State; it is enough that it has become private property, and it is then protected by the 'law of the land.'"

Speaking of the reserved power to "amend or repeal" the charter of the Union Pacific Company, *Waite, C. J.*, in the *Sinking Fund Cases*, 99 U. S. 700 (1878), delivering the opinion of the court, said: "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made."

In same case (p. 73), *Strong, J.*, defines property. In *The People v. O'Brien, su-*

*pra*, *Ruger, C. J.*, said: "It is also to be observed that in none of the provisions for repeal in this State is there anything contained which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited, rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. *Mumma v. Potomac Co.*, 8 Pet. 285. The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrevocable, or to undo what has been lawfully done under power lawfully conferred. *Butler v. Palmer*, 1 Hill, 335."

A legislative grant of an *exclusive right to supply gas to a municipality* and to its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is, after acceptance and performance by the grantee, a contract protected by the Constitution of the United States against subsequent State legislation which impairs it. The legislature, however, retains its police power, including the duty to protect the public health, morals, and safety. *New Orleans Gas Company v. Louisiana Light Company*, 115 U. S. 650 (1885); *Louisville Gas Company v. Citizens' Gas Company*, 115 U. S. 683. The same principle applied to a legislative grant of an *exclusive right to supply water to a municipality* and its inhabitants. *New Orleans Water-Works Company v. Rivers*, 115 U. S. 674 (1885).

<sup>2</sup> *Ante*, sec. 68; *post*, sec. 69, and note.

power of legitimate regulation and control, it cannot deprive them (that is, in essence, the *people* of the locality at whose expense it has been acquired or for whose benefit it was granted) of such property. It is in effect fastened with a trust for the incorporated municipality as long as the legislature suffers it to live, and for the benefit of the people of the locality if the corporate entity which represents their rights shall be dissolved.

§ 69 (41). **Legislative power over Contracts of Municipality.** — It is an interesting question, which has not yet arisen for judgment, whether the legislature of the State has the right, in virtue of its control over municipal corporations, to annul or interfere with *contracts between two municipalities*. This would depend perhaps upon the nature of the contracts, that is, whether they were public or corporate. If, however, a municipal corporation becomes indebted, the *rights of the creditor based upon the obligation of the contract* cannot, it is clear, be impaired by any subsequent legislative enactment.<sup>1</sup> Thus, where an act of the legislature was passed to provide

<sup>1</sup> Von Hoffman v. Quincy, 4 Wall. 535 (1866); approved in Wolff v. New Orleans, 103 U. S. 358; Galena v. Amy, 5 Wall. 705; Amy v. Galena, 7 Fed. Rep. 163; and see Meriwether v. Garrett, 102 U. S. 472; Butz v. Muscatine, 8 Wall. 575; Lee County v. Rogers, 7 Wall. 185; Furman v. Nichol, 8 Wall. 44; Woodruff v. Trapnall, 10 How. 206; Bronson v. Kinsie, 1 How. 316; Lansing v. County Treasurer, 1 Dillon Cir. C. R. 522; Muscatine v. Railroad Co., *Id.* 536; State v. Milwaukee, 25 Wis. 122; Brooklyn Park Comm'rs v. Armstrong, 45 N. Y. 234 (1871); Soutter v. Madison (act forbidding city to levy taxes to pay judgments held void), 15 Wis. 30; Western Savings Fund Society v. Philadelphia, 31 Pa. St. 175, 185; San Francisco v. Canavan, 42 Cal. 541 (1872); Goodale v. Fennell, 27 Ohio St. 426 (1875); s. c. 22 Am. Rep. 321. The power of taxation by a municipal corporation, and its limitation at the date of a contract, become a part of the contract, and continue to exist in favor of a creditor under such contract without regard to subsequent reduction of the limitation or restriction of the power. Morris v. State, 62 Tex. 728; United States v. Port of Mobile, 12 Fed. Rep. 768; Mobile v. Watson, 116 U. S. 289

(1885); United States v. County Court, 3 Fed. Rep. 1. Where a contract was made by a municipal corporation while a law providing a remedy by compulsory taxation was in force, the *repeal of the law and the adoption of a new Constitution* forbidding the levy of a tax in such case, were held invalid as impairing the obligation of the contract. Sawyer v. Concordia, 12 Fed. Rep. 754.

Where there is a *mode prescribed* by statute for *levying taxes* to pay the principal and interest of bonds which may be issued by municipal corporations in aid of railroads, it is considered a *part of the obligation*; and any subsequent change of it by the legislature which substantially modifies that mode so as to affect rights under the contract, is void as impairing the obligation of the contract. No rule can be laid down as to what constitutes such impairment, and each case must depend upon its own circumstances. Seibert v. Lewis, 122 U. S. 284. A contract made with a municipal corporation upon the faith of taxes to be levied, cannot be altered by the repeal or modification of the power of the municipality to levy the taxes; such legislation is void for being an impairment of the obligation of a contract. Nelson v. St. Martin's Parish, 111

for the payment of the debts of a municipal corporation, and authorizing the creation of a *sinking fund*, to be deposited and applied in a particular manner, and where creditors acting thereunder have surrendered the evidences of their debts and received new bonds, for the payment of which the fund stands pledged by the act, it is not competent — because it impairs the obligation of contracts — for a subsequent legislature, in providing for the liquidation of the corporate debts, to give a different destination to the sinking fund by changing the depository of the fund.<sup>1</sup>

So where the effect of an act of the legislature authorizing a city to *fund its floating debt* was, in substance, a pledge to those who surrendered their claims and received new obligations, of a portion of its revenues and property, to be applied to the payment of its obligations in a specified mode, *this, if acted on, constitutes a contract* which cannot be materially altered, either by the municipality or the legislature, without the consent of the creditors; but it was held that a subsequent act, simply changing the mode of levying

U. S. 716 ; *Louisiana v. Pillsbury*, 105 U. S. 278. *Post*, sec. 854.

But where, by the change, additional property is made taxable to pay the bonds, a levy of taxes upon both species of property may be ordered. *Cape Girardeau County v. Hill*, 118 U. S. 68. Previous to 1879 the city of New Orleans had the power to tax for general purposes to the extent of 12½ per cent. The Constitution adopted in that year reduced the limit to 10 per cent. On an application for a *mandamus* brought by a judgment creditor whose judgment was founded upon a contract entered into in 1873, the Supreme Court of that State held, that the *power of taxation as it existed at the date of the contract was read into it*, and that so far as was necessary to satisfy the contract the power of taxation had not been affected by the new Constitution; and the writ was issued directing the levy of a tax within the 12½ per cent limit to satisfy the judgment. *State, ex rel. Marchand v. New Orleans*, 37 La. An. 13. See, also, *State, ex rel. Thorn v. New Orleans*, 37 La. An. 528 ; *State ex rel. Carrière v. New Orleans*, 36 La. An. 687 ; *State, ex rel. Stewart v. Police Jury*, 34 La. An. 673. In a later case, upon a similar application, where the judgment

was based upon a contract entered into in 1874, after the adoption of an amendment to the Constitution, providing that the city should not increase its debt under any pretext, and forbidding the drawing of warrants except against cash actually in the treasury, it was held, by the same court, that the contract was restricted as to satisfaction to the revenues of the year, and imposed no obligation upon the city to exercise in the future the power of taxation possessed by it at that time; and it was also held that the provision in the Constitution of 1879 limiting the rate of taxation to 10 per cent was not a violation of the obligation of the contract. It refused to compel the city to levy a tax in excess of that limit. *State, ex rel. Gas Light Co. v. New Orleans*, 37 La. An. 436.

Further, see chapter on Contracts, *post*, sec. 511 *et seq.* For effect of judicial determination of the law at the time a contract is entered into, see *post*, sec. 517.

<sup>1</sup> *Liquidators v. Municipality*, 6 La. An. 21 (1851). As to *sinking fund*, see *Terry v. Bank*, 18 Wis. 87 ; *post*, chapter on Charters. *Fraudulent transfers* of property by municipal corporations. *Smith v. Morse*, 2 Cal. 524.

taxes, and which did not and could not affect the result or impair the security of the creditors, was not invalid.<sup>1</sup>

So, also, where the legislature authorized an indebted city to issue bonds to a specified amount, in payment of a like amount of its outstanding bonds, and among other provisions, plainly intended to induce creditors to make the exchange, was one prohibiting the city from thereafter issuing its bonds, "except in payment of its bonded debt," and this authority having been acted on, the arrangement accepted by the creditors, and new bonds issued, it was decided by the Supreme Court of Wisconsin that *the prohibition against the issue of further bonds* constituted, in favor of the holders of the new bonds, a contract which the legislature could not impair by a subsequent enactment authorizing the municipality to issue additional bonds for other purposes.<sup>2</sup>

§ 70 (42). **Same subject.** — But authority to a city to borrow money, and to tax all the property therein to pay the debt thus incurred, *does not necessarily deprive the State of the power to modify taxation* so as to exempt portions of the property, if the rights of creditors be not thereby impaired.<sup>3</sup> So authority given in a railroad

<sup>1</sup> *People v. Bond*, 10 Cal. 563 (1858). And see *People v. Wood*, 7 Cal. 579 (1857); *Brooklyn Park Comm'rs v. Armstrong*, 45 N. Y. 234 (1871).

<sup>2</sup> *Smith v. Appleton*, 19 Wis. 468 (1865). Text cited and approved. *Mount Pleasant v. Beckwith*, 100 U. S. 514. Extent of legislative power over *municipal indebtedness* as against the municipality, see *City v. Lamson*, 9 Wall. 477; and read, in connection therewith, *Campbell v. Kenosha*, 5 Wall. 194, in effect overruling the practical application of *Foster v. Kenosha*, 12 Wis. 616 (1860). *Further as to rights of creditors*, see *post*, chapters on Charters, Contracts, and Mandamus. *Youngs v. Hall*, 9 Nev. 212.

*When the performance of the obligation of a public or municipal corporation has been rendered impossible by act of the law*, as, for example, by a subsequent statute, the obligation is discharged, and no action against the corporation will lie thereon. This principle is well exemplified in *Brown v. Mayor &c. of London*, 9 Com. B. (N. S.) 726 (1861), respecting the liability of London on bonds payable out of tolls and duties levied on vessels navigating the Thames. In this country, how-

ever, it is to be remembered that the legislative power, as respects creditors, is restrained by the provision of the Federal Constitution that no State shall pass any act impairing the obligation of contracts.

<sup>3</sup> *Gilman v. Sheboygan*, 2 Black, 510 (1862); *Muscatine v. Railroad Co.*, 1 Dillon C. C. 536; *Seibert v. Lewis*, 122 U. S. 284 (1886); *Goodale v. Fennell*, 27 Ohio St. 426 (1875); s. c. 22 Am. Rep. 321; holding a subsequent act restricting power of assessment inoperative against a contractor who had agreed to take his payment in assessments.

*As against a municipal corporation, the legislature may*, it has been decided by the Supreme Court of Missouri, *repeal its powers to levy and collect wharfage*, although the proceeds of the public wharf had been pledged by the corporation, under legislative authority, as a fund in connection with other revenues for the payment of bonds issued for money borrowed by the corporation to maintain and improve the wharf. After the issue of such bonds, which were outstanding, and after the passage of a subsequent act repealing all acts which authorized the municipality to collect wharfage, it sued the



charter to a county to take stock and issue bonds therefor, if a majority of the voters so determine, is not a contract, but a mere authority conferred upon the county in its public capacity, and may be repealed after a vote at any time before the subscription has been made,<sup>1</sup> or agreed to be made.<sup>2</sup>

§ 71 (43). **Legislative power over Public Property of Municipality.**—The legislature, as the trustee for, and the representative of, the general public, has full control over the *public property* and the *public rights* of municipal corporations. Accordingly, it may authorize a *railroad company to occupy the streets* in a city without its consent and without payment to it;<sup>3</sup> but it could not, probably, authorize the taking of the private property of a city by a railroad company, except for public purposes, and upon compensation being made.<sup>4</sup>

defendant for refusing to pay wharfage, on the ground that the repealing act was unconstitutional; but the Supreme Court, assimilating the case to that of *Gilman v. Sheboygan*, 2 Black, 510, and distinguishing it from *Von Hoffman v. Quincy*, 4 Wall. 535, held that the city could not recover. The language of the judge delivering the opinion would seem to imply that the repealing act would not be invalid as to creditors unless other funds should prove insufficient; but it should be observed that this was not a point adjudged in the case. *St. Louis v. Shields*, 52 Mo. 351 (1873).

<sup>1</sup> *Aspinwall v. County of Jo Daviess*, 22 How. 364 (1859). When such repeal is effectual, see *People v. Coon*, 25 Cal. 635; *Union Pacific Railroad Co. v. Davis County*, 6 Kan. 256 (1870); compare *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625; *infra*, chapter on Contracts. In *The State v. Meller*, 67 Mo. 604, it was held by the Supreme Court of that State that while municipal corporations cannot, as between the legislature and themselves, place their privileges on the ground of contract, yet where the State creates a municipal corporation, and through it contracts with a third person, whereby rights become vested in the latter, it is beyond the power of the State to impair the obligations of the contract when the contract to subscribe for stock is completed. *C. & O. R. R. Co. v. Barren Co.*, 10 Bush (Ky.),

604 (1874); *Shelby Co. v. Cumberland & C. R. Co.*, 8 Bush (Ky.), 299.

In California it is held that while the legislature cannot *require the creditors of a county* to surrender their evidences of indebtedness, and accept new ones different in terms from the old, it may refuse to provide funds to pay any portion of the old indebtedness, unless the creditors will accept new evidences in place of the old, and for a less sum, and that there is no constitutional objection to a law which provides a county fund, out of which the holders of county indebtedness can obtain 50 per cent of the nominal value of their demands, whenever they may choose to accept the same. *People v. Morse*, 43 Cal. 534 (1872).

<sup>2</sup> *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625. More fully on this subject, see *infra*, chapter xiv. on Contracts.

<sup>3</sup> *Post*, sec. 701 *et seq.*

<sup>4</sup> *Ante*, sec. 68, and note, sec. 68, *a*, and notes; see *post*, secs. 72, 73. *Darlington v. Mayor, &c.*, 31 N. Y. 164 (1865); *Reynolds v. Stark County*, 5 Ohio, 204; 5 Ohio St. 113; *Clinton v. Railroad Co.*, 24 Iowa, 455 (1868); *Louisville v. University of Louisville*, 15 B. Mon. 642 (1855); *Portland & W. V. R. R. Co. v. Portland*, 14 Oreg. 188. See further, chapter on Streets and on Dedication, *post*; *People v. Kerr*, 27 N. Y. 188; *Mercer v. Railroad Co.*, 36 Pa. St. 99; *Mayor,*

It may *authorize corporations to make contracts*, but it is, perhaps, more doubtful how far it can compulsorily make, in the legal sense of the word, contracts for them, since the essence of a contract consists in the agreement of the parties.<sup>1</sup> And on this view it has been held, in Vermont, that the legislature cannot *without the consent* of a municipal corporation, appoint an agent for it, and authorize him, as such agent, to purchase property and bind the corporation to pay for it.<sup>2</sup> So the Supreme Court of Illinois has decided that the legislature, under peculiar provisions in the Constitution of that State, has no power to compel a city to incur a debt against its will.<sup>3</sup>

*etc. v. Hopkins*, 13 La. 326 ; *New Orleans, &c. Railroad Co. v. New Orleans*, 26 La. An. 517 ; *Ib.* 478 (1874) ; *Reading v. Commonwealth*, 11 Pa. St. 196 ; *post*, sec. 701 *et seq.*

<sup>1</sup> Cooley on Taxation (2d ed.), 688 *et seq.*, where the subject is discussed and the leading cases referred to.

<sup>2</sup> *Atkins v. Randolph*, 31 Vt. 226 (1858). The case was this: Plaintiff sued the town of Randolph in assumpsit for liquor sold to an "agent" appointed by the county commissioners to purchase liquors (under the act of 1852, "to prevent the traffic in intoxicating liquors"), at the expense of the town for which he was appointed. The town never gave any assent, express or implied, to this appointment; nor did it receive any benefit from the sale of the liquors, or have any knowledge that the agent was purchasing liquors on its credit. The court held the act of 1852 unconstitutional, and that the plaintiffs could not recover. The decision was put mainly upon the ground that the legislature could not authorize a binding contract to be made creating a debt against a public corporation without its consent. *Bennett, J.*, dissented, not on the ground that the corporation was bound by force of any contract, but because the act of 1852 imposed a duty upon the towns, as *municipal corporations*, to pay for the liquors, and this for *public purposes*, and to carry out a *police regulation*. Chief-Justice *Denio* criticises this case, and considers it as "standing upon no principle." *Darlington v. Mayor, &c. of New York*, 31 N. Y. 164, 205 (1865). On the other hand it is approved by *Lyon, J.*, in *State v. Tappan*, 29 Wis. 664 (1872) ; s. c. 9

*Am. Rep.* 662, referred to *infra*, sec. 75, and note. And see *Philadelphia v. Field*, 58 Pa. St. 320 (1868). *Post*, sec. 831, note ; sec. 72 *et seq.* *Hasbrouck v. Milwaukee*, 13 Wis. 37 ; *Mills v. Charlton*, 29 Wis. 400.

<sup>3</sup> *Cairo & St. Louis R. R. Co. v. City of Sparta*, 77 Ill. 505 (1875) ; *People v. Chicago (Lincoln Park Case)*, 51 Ill. 17 (1869) ; *People v. Salomon (South Park Case)*, *Ib.* 37 ; *Harard v. Drainage Company*, *Ib.* 130. Though the reasoning of the court is general, yet the point decided — that the city could not be compelled to contract a debt against its consent — was influenced by, if it does not rest upon, a constitutional provision (art. ix. sec. 5), which was construed to restrict the legislature from granting the right of local or corporate taxation to any other than the *corporate authorities of the municipality* or district to be taxed. In *Illinois* an act authorizing *police commissioners to issue certificates of indebtedness* without its consent is unconstitutional. *People v. Canty*, 55 Ill. 33 ; *ante*, sec. 60 ; *People v. McAdams*, 82 Ill. 356 ; *Park Comm'rs v. Tel. Co.*, 103 Ill. 33. Compare *Darlington v. Mayor, &c. of New York*, 31 N. Y. 164. See *Dunnovan v. Green*, 57 Ill. 63 ; *Sinton v. Ashbury*, 41 Cal. 525 (1871). In *California* it is held that the legislature may empower the authorities of a city to purchase an agricultural park, and to issue its bonds in payment therefor, and to levy a tax for their payment. *Sonoma County Bank v. Fairbanks*, 52 Cal. 196. *Infra*, sec. 72 *et seq.*

The general propositions in the text as to the restrictions on legislative power over *municipal corporations* will be found to be

§ 72. **Compulsory Contracts; Detroit Park Case.** — The Supreme Court of Michigan, in a case arising under a *statute relating to a public park for the city of Detroit*, which created a Board of Park Commissioners for the city, the act naming the commissioners and investing them with power to acquire by purchase the necessary lands, at a cost not exceeding \$300,000, and imperatively requiring the city council, without its assent to the appointment of the commissioners or to the purchase of the lands by them selected, to provide the money to pay therefor by the issue and sale of the bonds of the city, held that *the city could not be compelled against the will of the council, to issue its bonds*; and the decision was placed on the ground that a park was purely a matter of *local*, as distinguished from *State*, concern, and that it was beyond legislative competency to coerce a municipal corporation to contract a debt for local purposes without its consent.<sup>1</sup>

sustained by the following cases: *Atkins v. Randolph*, 31 Vt. 226 (1858); *White v. Fuller*, 39 Vt. 193; *Louisville v. The University*, 15 B. Mon. 642; *Western Savings Fund Society v. Philadelphia*, 31 Pa. St. 175, 185; *Montpelier v. East Montpelier*, 29 Vt. 12; *Poultney v. Wells*, 1 Aik. (Vt.) 180; *Trustees v. Winston*, 5 Stew. & Port. (Ala.) 17; *Norris v. Trustees Abingdon Academy*, 7 Gill & Johns. (Md.) 7; *Regents of University v. Williams*, 9 Gill & Johns. 365; *Trustees of Academy v. Aberdeen*, 13 Sm. & M. 21 Miss. 645; *Brunswick v. Litchfield*, 2 Me. (2 Greenl.) 28, 32.

<sup>1</sup> *People, ex rel. Park Comm'rs v. Common Council of Detroit* (mandamus to compel the council to raise money to pay for lands for the park), 28 Mich. 228 (1873); s. c. 15 Am. Rep. 202. The ground upon which the judgment in the Detroit Park Case, just mentioned, rests, as appears by the opinion of the court delivered by *Cooley, J.*, is that a municipal corporation like that of Detroit will be found to be in part a mere public agency of the State, and in part possessed of peculiar and local franchises and rights which appertain to it as legal personality for its *private* (as distinguished from the *public*) advantage. It is admitted that "in all matters of general concern there is no local right to act independently of the State, . . . and the State may exercise compulsory authority, and enforce the

performance of local duties, either by employing local officers for the purpose, or through agents or officers of its own appointment. . . . The proposition which asserts the amplitude of legislative control over municipal corporations, when confined, as it should be, to such corporations as agencies of the State in its government, is entirely sound. They are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the State at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. Indeed it would be easy to show that it is not from the standpoint of State interest, but from that of local interest, that the necessity of incorporating cities and villages most distinctly appears. State duties of a local nature can for the most part be very well performed through the usual township and county organizations. It is because, where an urban population is collected, many things are necessary for their comfort and protection which are not needed in the country, that the State is then called upon to confer larger powers and to make the locality a subordinate commonwealth. . . . It is a fundamental principle in this State, recognized and perpetuated by express provision of the Constitution, that the people of every hamlet, town, and city of the State are entitled to the bene-

§ 73. **Same subject.**—The judgment of this able court in the *Detroit Park Case*, as well as the argument of the eminent judge in the opinion by which it is supported, is in the author's judgment not only sound, but it is in accordance with the weight of judicial expression on the subject.<sup>1</sup> There are difficulties attending the assertion of unlimited legislative power over municipalities, and difficulties, also, in assigning limits to that power. The legislative power of the State ought to be at all times comprehensive enough and penetrating enough to enforce all duties and to redress all evils. Abuses will inevitably arise which nothing but legislative surgery can remedy. It seems to be right and just that the citizens of Detroit should not be compelled to incur a large debt for a park, which after all is a matter of luxury and ornament rather than a prime necessity. But change the instance. Suppose the city should refuse to provide a system of sewers or drainage, whereby the health of its people was injuriously affected: may it say that this does not concern the people of the State outside the city, that it is peculiarly a local matter, and therefore is beyond the power of the State to compel the city to make such a provision, and to raise the necessary taxes or make the necessary assessments to that end? On the whole, the question *whether a city may be compelled to create a debt or liability against its will* must be answered, we think, with reference

*fits of local self-government.* But authority in the legislature to determine what shall be the extent of the capacity in a city to acquire and hold property is not equivalent to, and does not contain within itself authority to *deprive the city of property* actually acquired by legislative permission. As to property it thus holds for its own private purposes, a city is to be regarded as a constituent in State government, and is entitled to the like protection in its property rights as any natural person who is also a constituent. *The right of the State is a right of regulation, not of appropriation.* It cannot be deprived of such property without due process of law. And when a local convenience or need is to be supplied in which the people of the State at large, or any portion thereof outside the city limits, are not concerned, the State can no more by process of taxation take from the individual citizens the money to purchase it, than they could, if it had been procured, appropriate it to the State use. . . . From the very dawn of our liberties the principle most unques-

tionable of all has been this: that the people shall vote the taxes they are to pay, or be permitted to choose representatives for the purpose."

*Supra*, sec. 71 n. *Callam v. Saginaw*, 50 Mich. 7, cited *infra*, sec. 140, note. See, also, *Detroit v. Plank Road Co.*, 43 Mich. 140; *Mayor v. Park Comm'rs*, 44 Mich. 602, cited *infra*, sec. 565, note. The city's ownership of *gas works* is in its local or private, as distinguished from its public character. *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 183. "Provisions for local conveniences for the citizens, like water, light, public grounds for recreation, and the like, are manifestly matters which are not provided for by municipal corporations in their political or governmental capacity, but in that *quasi* private capacity in which they act for the benefit of their corporators exclusively." *Cooley on Taxation* (2d ed.), 688.

<sup>1</sup> See *supra*, sec. 68, and note; sec. 68 a, and notes.

not only to the constitutional provisions of the State, but to the nature of the purposes for which the debt or liability is to be incurred.

§ 74. **Same subject.** — Thus, if there is no special limitation in the Constitution, and the debt or liability is one to be incurred in the discharge of a *public or State duty*, which it is proper for the legislature to impose upon the municipality, it can constitute no objection to the validity of the Act that the debt or liability is to be created without its consent. Accordingly, in the absence of constitutional restriction, it has been decided, and the decision is doubtless correct, that it is *competent for the legislature to direct a municipal corporation to build a bridge over a navigable watercourse within its limits*, or the State may appoint agents of its own to build it, and empower them to create a loan to pay for the structure, payable by the corporation.<sup>1</sup> Thus also, since municipal corporations are instruments of government, created for political purposes, and subject to legislative control, and since it is one of the ordinary duties of such corporations, under legislative authority, to make and keep in repair the streets and highways and bridges connected therewith, the Court of Appeals in Maryland sustained an act mandatory in its terms, which not only empowered but *required the city of Baltimore in its corporate capacity to take charge of and maintain as a public highway a specified bridge within that city*, and enforced the duty created by the act of mandamus.<sup>2</sup> But the legislature cannot by an imperative

<sup>1</sup> Philadelphia v. Field, 58 Pa. St. 320 (1868), approving Thomas v. Leland, 24 Wend. 65; Guilder v. Otsego, 20 Minn. 74 (1873); *supra*, sec. 54, note, and cases cited. United States v. B. & O. R. R. Co., 17 Wall. 322 (1872); *post*, sec. 775; Carter v. Bridge Proprietors, 104 Mass. 236 (1870). But the legislature would not, of course, possess such extensive powers over a private corporation. Erie v. Canal, 59 Pa. St. 174. Public highways and bridges are matter of general, or State, rather than of municipal concern. Cooley, Taxation (2d ed.), 682. A city street, however, while its character is chiefly public, has also a local and peculiar and quasi-public or corporate character; which is shown in chap. xviii. on Streets and chap. xxiii. on Actions.

<sup>2</sup> Pumphrey v. Baltimore, 47 Md. 145. A county being justly indebted under a contract for the erection of public buildings

therein, *the legislature may require it to issue its bonds to pay such indebtedness.* Jefferson County v. People, 5 Neb. 136 (1876). The power of the legislature over municipal contracts and liabilities was very fully considered in The People v. Batchellor, 53 N. Y. 128 (1873); s. c. 13 Am. Rep. 480, and the conclusion was reached that while municipalities may be compelled by the legislature, without their consent, to construct and maintain improvements of a public character, and even enter into contracts for this purpose, they could not be compelled, without their consent or that of their taxable inhabitants, to become stockholders in a railway corporation; and therefore a mandatory statute requiring a municipal or public corporation to subscribe for stock in a railway corporation, and issue its bonds in payment therefor, without such consent, was unconstitutional. The opinion of

statute compel a municipality, without its consent or that of its inhabitants, to create a debt to aid in the construction of a railway.<sup>1</sup>

§ 74 a. **Same subject. Compulsory liability ; City Hall building in Philadelphia.** — If the legislature has unlimited power to determine for what purposes and in what amounts indebtedness chargeable upon a municipality and payable by its inhabitants may be created *without their consent* or that of their local authorities, it is a power of such a nature as to be certain to lead to abuse and oppression. This is strikingly illustrated by the experience of the city of Philadelphia, which it is profitable to record for instruction and warning. At an early day the Supreme Court of Pennsylvania, under the lead of Chief-Justice Gibson, asserted, in a great variety of cases, a measure of legislative power almost as unlimited as that of Parliament. It came to be the accepted doctrine in that State, that municipalities held not only their existence but all of their rights

Grover, J., contains a valuable review of many of the leading decisions upon the extent of legislative control over municipalities. And the case is distinguished from *The People v. Flagg*, 46 N. Y. 401, where a mandatory act of the legislature, requiring the town of Yonkers, without its consent, to issue bonds to raise money to be expended in the construction of highways in the town, was held to be constitutional. The case of *Batchellor* was also distinguished, or attempted to be, from the decisions of the Supreme Court of the United States and of the State courts, to the effect that railway corporations are public, and erected for public purposes in such a sense as that the taxing power may be employed to aid in their construction, unless there is some special limitation in the Constitution of the particular State. The case of *People v. Flagg*, *supra*, was decided before the constitutional amendment of 1874, prohibiting local legislation on the subject of laying out and working highways, but permitting such power to be delegated to the local authorities by general laws. *People v. Supervisors*, 112 N. Y. 585 (1889), distinguishing *People v. Flagg*. See *Town of Flatbush, In re*, 60 N. Y. 398 (1875), cited, *ante*, sec. 63, note ; *Jensen v. Supervisors*, 47 Wis. 298 ; *post*, sec. 831, note.

In the Brooklyn and New York Bridge Case, the court of appeals have declared

that the erection of a bridge to connect two cities may be a "city purpose," for which indebtedness may be incurred under the late constitutional amendment upon that subject. In deciding such a question the court said that great weight should be given to the determination of the legislature. A constitutional provision that no county, city, or town shall give money or loan its credit to any individual or corporation, or become the owner of corporate stock or bonds, is not in conflict with a statute authorizing two cities already owning stock in a company organized to build a bridge between such cities, to become the owners of the whole stock, by purchasing the stock of the private stockholders, or, in case of a failure to agree, by taking it by eminent domain. A statute authorizing the erection of a certain bridge, provided that the trustees should call on the cities who were to pay for it for the funds necessary, "provided, however, that the whole amount to be paid by both cities shall not exceed eight million dollars." Held that this was not an absolute limit against a greater cost, but only a direction that no more should be called for without further legislative authority. (*Church, C. J., Folger and Miller, JJ., dissenting.*) *People v. Kelly*, 5 Abb. N. Y. New Cas. 383.

<sup>1</sup> *People v. Batchellor, supra*.

at the absolute will of the legislature, which, if it chose, could govern the inhabitants of municipalities by its own appointees.<sup>1</sup> Acting under this view, the legislature in 1870 passed an act "To provide for the erection of all public buildings required to accommodate the courts for all the municipal purposes within the city of Philadelphia." By this act the legislature decided that the city should have new public buildings. The act selected certain citizens by name, whom it appointed commissioners for the erection of the buildings. It made this body perpetual by authorizing it to fill vacancies. It was not chosen by the inhabitants or taxpayers, or removable by them, or accountable to them. It was authorized without the consent of the municipal authorities to make contracts to construct the buildings, which the act declared should be binding at law upon the city and the contractors. It was authorized prior to December 1 of each year to make requisitions on the common councils for the amount of money required for the succeeding year; and the act made it the duty of the common councils to levy a special tax sufficient to meet the requisition, and to do all such acts as the commission might from time to time require. This commission was imposed by the legislature upon the city, and given absolute control to create debts for the purpose named, and

<sup>1</sup> Philadelphia v. Fox, 64 Pa. St. 160, 180, 181, per *Sharswood*, J., who, giving the judgment of the court, says: "A municipal corporation is merely an agency of government fully subject to the control of the legislature, who may enlarge or diminish its territorial extent, or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion. . . . The sovereign may continue its [the city's] corporate existence, and yet assume or resume the appointments of all of its officers and agents into its own hands; for the power which can create and destroy can modify and change."

It may, we think, be doubted whether, upon full and mature consideration, the Constitutions of the several American States do not contain express or implied limitations upon the autocratic power of the legislature asserted in the paragraph quoted, which, however, is typical of many to be found in the judicial discussions on this subject. We are inclined to concur in the soundness of the observations quoted below, of an eminent judge

and jurist, who has given much attention to this subject. In the course of an interesting chapter "on local taxation under legislative compulsion," Judge *Croley* (Taxation, 2d ed. chap. 21. p. 678) says: As "local powers of taxation must come from the State, it might seem to follow, as a corollary, that the State could, at pleasure, withhold the grant and exercise the power itself. But in the general framework of our republican governments nothing is more distinct and unquestionable than that they recognize the existence of local self-government and contemplate its permanency. Some State Constitutions do this in express terms, others by necessary implication; and probably in no one of the States has the legislature been entrusted with the power which would enable it to abolish the local government. It has usually a large authority in determining the extent of local powers and the framework of local government; but while it may shape the local institutions, it cannot abolish them, and, without substituting others, take all authority to itself."

to require the levy of taxes for their payment. A scheme more repugnant to all notions of local self-government than that which was forced upon the city and committed to this legislative oligarchy cannot well be conceived. "They projected (according to a learned judge of that State) structures at the corner of Broad and Market streets upon a scale of magnificence better suited for the capital of an empire than the municipal buildings of a debt-burdened city."<sup>1</sup>

Acts vesting the ordinary municipal functions in commissions appointed by the legislature would seem in this State not to have been unfrequent. Public discontent was exhibited, and at length found its expression in the amended Constitution of 1874, which prevents for the future the creation of such commissions, by ordaining "That the General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise; or to levy taxes, or to perform any municipal function whatever."<sup>2</sup> This Constitution also provided that "no debt shall be contracted or liability incurred by any municipal commission except in pursuance of appropriations previously made by the municipal government."<sup>3</sup> These provisions failed however to give relief in respect to the buildings in question, for the construction of which the commission had, prior to 1874, entered into contracts. The provision first quoted was held to be prospective only, and not to apply to special commissions existing before the adoption of the amended Constitution. And as to the second provision above quoted, it was held that while it would prevent the commission thereafter from entering into any contract until an appropriation had been made by the municipal government, it did not repeal the obligation imposed by the above mentioned Act of 1870 upon the common councils to raise the amount required by the commissioners and to levy the necessary taxes. Accordingly, the Supreme Court, on the relation of the commission, decided that it was entitled to a peremptory mandamus to compel the common councils (they having refused to do so) to levy a special tax to meet a requisition of the commission for \$1,500,000, this being the amount found by the commission

<sup>1</sup> Per *Paxson, J.*, in *Perkins v. Slack*, 86 Pa. St. 283 (1878). Speaking of this building, Judge *Hare* says (1 Am. Const. Law, 630): "For nearly twenty years all the money that could be spared from immediate and pressing needs has been com-

pulsorily expended upon an enormous pile which surpasses the town halls and cathedrals of the Middle Ages in extent, if not in grandeur."

<sup>2</sup> Art. 3, sec. 20, Constitution of 1874.

<sup>3</sup> Art. 15, sec. 2, Constitution of 1874.



to be necessary for the succeeding years for the city hall building before mentioned.<sup>1</sup>

§ 75 (44). **Mandatory Statutes to pay Claims not legally binding on the Municipality.** — The fact that a claim against a municipal or public corporation is not such an one as the law recognizes as of *legal obligation* has often been decided, by courts of the highest respectability and learning, to form no constitutional objection to the validity of a law imposing a tax and directing its payment;<sup>2</sup>

<sup>1</sup> Perkins v. Slack, 86 Pa. St. 270 (1878). It is confessedly difficult in many cases to define the line of demarcation between public or State powers and duties which municipalities may be compelled to perform as State agencies, and those of a private or *quasi* private or corporate nature which pertain to municipalities as the organized representatives of compact communities for their own special local benefit and convenience. General usage and practice must largely guide the inquiry. A county may doubtless be compelled to build a court-house if no special constitutional restriction stands in the way. But the building of a city hall of the character of the one in Philadelphia would seem rather to belong to the category of local or municipal, as distinguished from State or public objects, which, therefore, cannot, or, if it can, ought not to be forced by central legislative dictation upon a reluctant community, which alone must bear the burden. In *Michigan* the State cannot compel, but it may authorize, an incorporated city to erect a court-house for the county in which the city is situated. *Callam v. Saginaw*, 50 Mich. 7.

<sup>2</sup> *Guilford v. Supervisors, &c.*, 13 N. Y. (3 Kern.) 143 (1855). This case holds the following propositions: 1. That the legislature has power to levy a tax upon the taxable property of a town, and appropriate the same to the payment of a claim made by an individual against the town. 2. That it is not a valid objection to the exercise of such power that the claim, to satisfy which the tax is levied, is not recoverable by action against the town. 3. That it does not alter the case that the claim has been rejected by the voters of the town, when submitted to them at a town meeting, under an act of

the legislature authorizing such submission, and declaring that their decision should be final and conclusive.

This case has been approved, *arguendo*, by the Supreme Court of the United States. *The United States v. Baltimore & Ohio Railroad Co.*, 17 Wall. 322 (1872); *New Orleans v. Clark*, 95 U. S. 654 (1877). *Infra*, sec. 76 a.

On the other hand, the same case has been disapproved by the Supreme Court of Wisconsin, in *The State v. Tappan*, 29 Wis. 664 (1872); s. c. 9 Am. Rep. 622, and an act of the legislature of Wisconsin, similar in its nature and principles to that involved in *Guilford v. Supervisors*, *supra*, was held unconstitutional. The opinion of *Lyon, J.*, evinces great care in its preparation; but it has failed to satisfy us that, in the absence of special constitutional restraints, the extent of the legislative power of taxation depends upon the *consent* of the municipality or the people therein, or that the special act before the court exceeded the rightful power of the legislature. The principle has been reaffirmed, in *Massachusetts*, that the discretionary power of the legislature in the distribution of public burdens embraces the power to authorize an assessment on one district for part of the expense of repairing a portion of a bridge in another. *Carter v. Bridge Proprietors*, 104 Mass. 236 (1870); *post*, sec. 737. See Mr. Sedgwick's opinion of this legislation, *Const. and St. Law*, 813, 814. The principle of *Guilford v. Supervisors* was applied in *Brewster v. Syracuse*, 19 N. Y. 116 (1859), where it was decided by all of the judges of the Court of Appeals that the legislature has the power to authorize the levy of a tax for the purpose of paying to one who has constructed a municipal improvement (a street sewer)

but the validity of legislation of this character, if it interferes with what has been called the *private contracts* of such corporations, must be sustained on the ground that such contracts, so far as the corporations are concerned, are under the absolute control of the legislature, and not within the protection of the contract clause of the national Constitution. The cases on this subject, when carefully examined, seem to the author to go no further, probably, than to assert the doctrine that it is competent for the legislature to compel municipal corporations to recognize and pay debts or claims not binding in strict law, and which, for technical reasons, could not be enforced in equity, but which, nevertheless, are just and equitable in their character, and involve a moral obligation.<sup>1</sup> To this extent

an addition to the contract price, which the corporation was forbidden to pay by its charter. The court did not consider that there was any contract in the case, and sustained the legislation on the ground that it was warranted by the taxing power, which, in that State, was not restrained, thus leaving it in the discretion of the legislature to recognize and direct the payment of claims founded in equity and justice, or in gratitude or charity. *People v. Mayor, &c. of Brooklyn*, 4 Comst. (N. Y.) 419. And see *Thomas v. Leland*, 24 Wend. 65 (1840); *People v. Dayton*, 55 N. Y. 367 (1874); *infra*, sec. 76 a; *Shelby Co. v. Railroad Co.*, 5 Bush (Ky.), 225; *Philadelphia v. Field*, 58 Pa. St. 320 (1868). This seems to be carrying the doctrine of the control of the legislature over public corporations to its extreme limit. See Mr. Justice Cooley's views, *Const. Lim.* 380, 491, notes. *Taxation* (2d ed.), 685, 698. The Supreme Court of California has followed and approved *Guilford v. Supervisors*. *Blanding v. Burr*, 13 Cal. 343 (1859); *North Mo. R. R. Co. v. Maguire*, 49 Mo. 490, 500, (1872). And more recently in New York the Court of Appeals, while not questioning the judgment in *Guilford v. Supervisors, &c.*, criticised and limited some of the *dicta* in that case as to the extent of the legislative power. *Weismer v. Village of Douglass*, 64 N. Y. 91; s. c. 21 Am. Rep. 586. See *infra*, sec. 76 a. Under special provisions of Michigan Constitution, see *People v. Onandaga*, 16 Mich. 254. *Where one county is under a moral obligation to reimburse another county for certain ex-*

*penses, the legislature may give this a legal effect by a subsequent act.* *Lycoming v. Union*, 15 Pa. St. 166 (1850); *O'Hara v. State*, 112 N. Y. 146 (1889); *Cole v. State*, 102 N. Y. 54. *Rights of trial by jury may be denied by the legislature to municipal corporations, these being mere creatures of its policy, with such rights only as it sees proper to confer.* *Borough of Dunmore's Appeal*, 52 Pa. St. 374; *Kelsh v. Dyersville*, 68 Iowa, 137; but see *ante*, sec. 66, note.

<sup>1</sup> *Blanding v. Burr*, 13 Cal. 343 (1853); *Lycoming v. Union*, 15 Pa. St. 166; *Guilford v. Supervisors*, 13 N. Y. 144 (1855); *Brewster v. Syracuse*, 19 N. Y. 116 (1859); *Thomas v. Leland*, 24 Wend. 65 (1840); *Hasbrouck v. Milwaukee*, 21 Wis. 217 (1866); *Smith v. Morse*, 2 Cal. 524; *Grogan v. San Francisco*, 18 Cal. 590; *Sinton v. Ashbury*, 41 Cal. 525 (1871); *New Orleans v. Clark*, 95 U. S. 644 (1877); *People v. Lynch*, 51 Cal. 15 (1875); *Creighton v. San Francisco*, 42 Cal. 446 (1877); *People v. Supervisors*, 70 N. Y. 228 (1877). Text approved. *Nevada v. Hampton*, 13 Nev. 441; *infra*, sec. 76 a, sec. 77, note.

The legislature, in favor of a county collecting officer, who has settled and paid a claim against him, may pass an act authorizing the settlement to be opened and *equitably* adjusted, and such an act is an implied direction that the rule of law as to voluntary payments, shall not apply. *Burns v. Clarion Co.*, 62 Pa. St. 422 (1869). In California the legislature cannot compel a city to pay a claim which it is under no obligation whatever to pay;

and with this limitation, the doctrine is unobjectionable in principle, and must be regarded as settled, although it asserts a measure of control over municipalities, in respect of their duties and liabilities, which probably does not exist as to private corporations and individuals.

§ 76. **Same subject.** — Accordingly, in a case where a municipality, after the passage of an act of the legislature which provided that towns and cities should not thereafter "have power to contract any debt without fully *providing in the ordinance creating the debt the means of paying the principal and interest*," issued bonds without such a provision as the above statute required, and used them in payment of an authorized indebtedness, the Supreme Court of the United States held that inasmuch as *the bonds represented an equitable claim against the city*, it was competent for the legislature to interfere and require the city to pay them. "The power of the legislature," says Field, J., delivering the judgment of the court, "to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on technical grounds, would seem to be clear. . . . A very different question," the learned judge cautiously adds, "would be presented if an attempt were made to apply the means raised [by taxation] to the payment of claims for which no consideration had been received by the city."<sup>1</sup>

§ 76 a. **Same subject.** — A bank advanced money to commissioners for the construction of the New York City court-house. In making these advances the bank was represented by its president,

nor require a court to render judgment on proof of the amount thereof. *Hoagland v. Sacramento*, 52 Cal. 142. See *infra*, sec. 76.

<sup>1</sup> *New Orleans v. Clark*, 95 U. S. 644, 652 (1877). The power of the legislature to appropriate the moneys of municipal corporations in payment of claims ascertained by it to be equitably due to individuals, though such claims be not enforceable in the courts, depends largely, in the view of the Supreme Court of California, upon the legislative conscience, and will not be interfered with by the judicial department unless in exceptional cases; and the circumstance that the contract under which the plaintiff did certain work in San Francisco, expressly provided that the city

should in no event be liable for any portion of the expenses thereof, was held not to affect or in any manner invalidate an act subsequently passed by the legislature requiring the city to pay him a debt which in good conscience it ought to pay. *Creighton v. San Francisco*, 42 Cal. 446 (1872); *Sinton v. Ashbury*, 41 Cal. 525 (1871); *New Orleans v. Clark*, 95 U. S. 644 (1877); *supra*, secs. 75, 76.

In Iowa it appears to be regarded as not within the power of the legislature to provide a means for the collection of an unconstitutional obligation against a public corporation, as where a debt had been incurred in excess of the limit fixed by the Constitution. *Mosher v. School District*, 44 Iowa, 122 (1876).

and it made the advances in good faith without notice of any conspiracy or misappropriation; but in fact the commissioners had entered into a fraudulent conspiracy to raise bills for work above the true amount and to divide the excess among themselves. Part of the money advanced went into the court-house, but the larger portion of it was fraudulently diverted by the commissioners. Three of the conspirators were directors of the bank, but were not present when any action was taken in respect of the advances by the bank. After this, the legislature passed an act directing the city to pay back to the various banks all moneys which had been advanced by them for the use of any of the departments of the city or county, which act included the advance above mentioned. This act was held to be a valid exercise of the legislative power.<sup>1</sup>

§ 77 (45). **Ratifying void Local Assessments.** — It has, however, been decided in Maryland, that, as *against the abutters, the legislature could not ratify an assessment for a local improvement in front of their property*, which had been adjudged to be void, and compel them to pay for the same.<sup>2</sup> In the case just mentioned, the legislature, in an act relating to the grading and paving of an avenue in the city of Baltimore, among other things required, as preliminary to proceedings thereunder, that the mayor and council of the city should determine the proposed work to be consistent with the public good. An application by property owners for the improvement was made to the city commissioners instead of the mayor and council, and the commissioners determined to grade the avenue, awarded the contract, and the contractor did the work at the cost of over \$100,000. The abutters instituted no proceedings to stop the work; and after it was completed the city passed an ordinance ratifying the contract to grade, and all the acts of the officers of the

<sup>1</sup> Mayor, &c. of New York v. Tenth National Bank, 111 N. Y. 446 (1888). *Earl, J.*, says: "The legislature may determine what moneys they may raise and expend, and what taxation for municipal purposes may be imposed; and it certainly does not exceed its constitutional authority when it compels a municipal corporation to pay a debt which has some meritorious basis to rest on"; citing *Town of Guilford v. Supervisors*; *Brewster v. City of Syracuse*; *Darlington v. Mayor*, 81 N. Y. 164; *Brown v. Mayor*, 68 N. Y. 239.

Assuming that the commissioners had no power to borrow money, and that the

city was not liable for the advances made to them by the bank, this retroactive act imperatively requiring the city, without its consent, to make good to the bank the large amount which the conspirators put into their pockets and which never went into the work, seems to carry the legislative power beyond the just limits of equitable or moral obligation, which the author cannot but think is the true measure of legislative power of this character.

<sup>2</sup> *Baltimore v. Horn*, 26 Md. 194 (1866); compare with cases cited in secs. 75 and 79; *Lennon v. New York*, 55 N. Y. 361 (1874).

city in relation to the grading of the avenue. An assessment being made upon their property, to pay the expense of the grading, they filed a bill for an injunction and relief, and it was judicially determined that the proceedings of the city commissioners were *coram non judice* and void, and that they could not be ratified by ordinance.<sup>1</sup> After this judicial determination, the legislature passed an act directing the city to pay the contractors for the work done by them and accepted by the city, to borrow the money for the purpose, and levy a tax for its payment, which the city did. But at the same session, the legislature, to reimburse the city treasury, empowered the city to collect from the abutters on the avenue graded the amounts which had been assessed and ascertained by the city commissioners; and this last act was held by the court of appeals to be void, because it was an assumption of judicial power by the legislature, and, in effect, a legislative reversal of the former judgment of the court.

§ 78. **Same subject.** — In *levying a local assessment* upon the abutting property, a lot within the district declared to be benefited was omitted, after which the legislature validated the assessment, this omission and exemption being retained and preserved; and it was held by the Supreme Court of California that the validating act was unconstitutional.<sup>2</sup> The ground for this judgment is satisfactory; since the legislature could not prospectively have exempted the property omitted because it would have violated the constitutional requirement of uniformity,<sup>3</sup> it could not do this retrospectively.

§ 79 (46). **Curative Acts.** — *In general, however, the legislature may, by subsequent act, validate and confirm previous acts of the corporation otherwise invalid.* If the act could have been lawfully performed or done under precedent legislative authority, the legislature may subsequently ratify it and give it effect.<sup>4</sup> Merely because

<sup>1</sup> *Baltimore v. Porter*, 18 Md. 284 (1861); see *infra*, sec. 814. In *Brown v. Mayor, &c. of New York*, 63 N. Y. 239 (1876), a legislative ratification of an *ultra vires* contract for street improvements was sustained. *Duanesburg v. Jenkins*, 57 N. Y. 177 (1874). *Infra*, secs. 79, 544. *O'Hara v. State*, 112 N. Y. 146 (1889).

<sup>2</sup> *People v. Lynch*, 51 Cal. 15 (1875); s. c. 21 Am. Rep. 676. Followed in *Schumacher v. Toberman*, 56 Cal. 508, where *McKinstry, J.*, said: "The legislature cannot legalize a void assessment, nor by direct act make an assessment within

an incorporated city." *Infra*, secs. 79, 544.

<sup>3</sup> *Post*, sec. 755, and cases cited in note. For construction of constitutional provision in California in respect of equality and uniformity of taxation, the opinion of *McKinstry, J.*, in *The People v. Lynch*, *supra*, will repay reading.

<sup>4</sup> *Bridgeport v. Railroad Co.*, 15 Conn. 475 (1848), in which it was held that the legislature might validate prior subscription of city to stock of railroad company. s. p. *Winn v. Macon*, 21 Ga. 275 (1857); *Mattingly v. District of Col.*, 97 U. S.

such legislation, in matters not relating to crimes, is retrospective, does not make it void. If in addition to its being retrospective, it unjustly impairs or abrogates vested rights, and, without reasonable cause, imposes upon third persons new duties in respect to past transactions, it will be void because in conflict with the Constitution.<sup>1</sup>

687; *McMillen v. Boyles*, 6 Iowa, 304; *Id.* 391; *New Orleans v. Poutz*, 14 La. An. 853; *Bissell v. Jeffersonville*, 24 How. 287, 295 (1860); *Atchison v. Butcher*, 3 Kan. 104 (1865); *Frederick v. Augusta*, 5 Ga. 561; *Allison v. R. W. Co.*, 9 Bush (Ky.), 247 (1872); *Truchelut v. City Council*, 1 Nott & McCord (S. C.), 227; *Citizens' Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1; *Tift v. Buffalo*, 82 N. Y. 204; *Cooley, Const. Lim.* 371, 379; *post*, secs. 419, 551, 814; *contra*, under Constitution of Illinois; *Marshall v. Silliman*, 61 Ill. 218; but see *infra*, sec. 544, note. A healing statute is not unconstitutional by reason of giving validity to an act irregularly done which the legislature could have authorized to be done in the irregular way in the first instance. *Lockhart v. Troy*, 48 Ala. 579 (1872).

It is competent for the legislature, by subsequent enactment, to cure defects or omissions in the proceedings of the superintendent of streets. *San Francisco v. Certain Real Estate*, 42 Cal. 517 (1872). Where the original purpose for which the power of taxation is invoked is one of the ordinary purposes of municipal government and within the powers granted, and where there is no fraud or oppression in the creation of the debt or burden, and no inequality or injustice in the apportionment of the tax, the legislature may by subsequent enactment cure any defect in the proceedings to collect the tax which it could in the first instance, by prior enactment, have made immaterial. *Emporia v. Norton*, 13 Kan. 560; approved in *Mason v. Spencer*, 35 Kan. 512. (An act curing defect in mode of collecting a sewer tax held valid.) Subsequent legislative ratification of the acts of a municipal corporation, which might lawfully have been performed under precedent legislative authority, is valid and effectual. *Anderson v. Santa Anna*, 116 U. S. 364, a case

from Illinois. Adhered to in *Bolles v. Bromfield* (a case from Illinois), 120 U. S. 759 (1886), although after the issue of the bonds in suit by the municipality the Supreme Court of the State of Illinois had decided against the validity of such curative legislation. *Otoe County v. Baldwin*, 111 U. S. 1; *Grenada Co. v. Brogden*, 112 U. S. 261, 262. Curative act held ineffectual by reason of original want of power in municipality to issue bonds, and of a disabling provision in the Constitution of Mississippi. *Katzenberger v. Aberdeen*, 121 U. S. 172. But a retrospective act, to make valid a tax upon property not within the corporation when levied, was held void. *Atchison, &c. R. R. Co. v. Maquillon*, 12 Kan. 301 (1873).

<sup>1</sup> *Bridgeport v. R. R. Co.*, 15 Conn. 475, 497, and cases cited *per Church, J.* Laws passed to remedy defective execution of powers of public corporations, or their officers, are valid, though retrospective in their operation, unless they contravene some provision of the State Constitution. *State v. Newark*, 3 Dutch. (N. J.) 187 (1858); *Bissell v. Jeffersonville*, 24 How. 287, 295, where such curative acts are said to be valid when contracts are not impaired, or the rights of third persons injuriously affected. *New Orleans v. Clark*, 95 U. S. 644 (1877).

It is competent for the legislature to validate a city ordinance which had become null and void for want of being recorded, and to provide that the omission to record shall not impair the lien of the assessments against the lot-owners. *Schenley v. Commonwealth*, 36 Pa. St. 29 (1859). The legislature may ratify, and thereby make binding an unauthorized municipal subscription to the stock of an incorporated theatre company. *Municipality v. Theatre Company*, 2 Rob. (La.) 209 (1842); but, *quære*, whether, if the legislature had the power, the act in this case was properly held to be a ratification. Dan-

§ 80 (47). **Legislative Power over Property held in trust for Specific Uses.** — While it is undeniable that the legislature has full control over public corporations, and over the funds which belong to them as such, and held for strictly public purposes, yet where by authority of law such corporations *hold property or funds in trust for specific uses*, it is left in doubt by the cases how far the legislature can, unless the uses be public or charitable, interfere with or control such trust property or funds. In a case of great interest, the Supreme Court of Pennsylvania decided that it was within the power of the legislature to deprive the city of Philadelphia of the right to administer charitable trusts under the will of Mr. Girard and others, which had been granted to and accepted by it, and to confer the administration of these trusts upon a separate body called "Directors of City Trusts," appointed by the judges of the Supreme Court and other judges named in the act. It is to be remarked, however, that the legislature did not attempt to change or pervert the trusts themselves.<sup>1</sup> Certain it is, that without legislative authority a municipal corporation holding the legal title to property in trust cannot use the funds derived from such property for corporate purposes, or indeed for any except the trust purposes.<sup>2</sup>

ially *v. Cabaniss*, 52 Ga. 211 (1874). See, further on this subject, chapter on Contracts, *post*, sec. 544. Text cited and approved. *Pompton v. Cooper Union*, 101 U. S. 196.

<sup>1</sup> *Philadelphia v. Fox*, 64 Pa. St. 169 (1870). Such a power has since been taken away from the legislature. Const. Pa., 1874, art. 3, sec. 20; *supra*, sec. 74 a; *post*, sec. 567 *et seq.*

<sup>2</sup> *White v. Fuller*, 39 Vt. 193; *ante*, sec. 64; *Montpelier v. East Montpelier* (contest as to trust property on division of town), 27 Vt. (1 Wms.) 704 (1854); same controversy in chancery, 29 Vt. (3 Wms.) 12. See, also, *Trustees, &c. v. Bradbury*, 2 Fairf. (Me.) 118; *Poultney v. Wells*, 1 Aik. (Vt.) 180; *Plymouth v. Jackson*, 15 Pa. 44; *Harrison v. Bridge-ton*, 16 Mass. 16; *Daniel v. Memphis*, 11 Humph. (Tenn.) 582; *Trustees of Academy v. Aberdeen*, 13 Sm. & M. (21 Miss.) 645, as to which, *quære*. *Aberdeen v. Sanderson*, 8 Sm. & M. 670; *Chambers v. St. Louis*, 29 Mo. 543; *Holland v. San Francisco*, 7 Cal. 361; *Girard v. Philadelphia*, 7 Wall. 1. See, *post*, chapters on Corporate Property and Remedies against Illegal Corporate Acts.

A conveyance was made in 1873, by the proprietors of the lands, to the selectmen of North Yarmouth, of "all the flats, sedge banks, and muscle beds in said town, lying below high-water mark, . . . for the sole use and benefit of the present inhabitants, and of all such as may or shall forever inhabit or dwell in said town," &c. It was decided that this property was held by the town as a *public* corporation, subject to legislative control, *in trust* for the use of all of the inhabitants, and that upon a division of the town, it was competent for the legislature to provide that the original town should still hold such property in trust for the inhabitants of both towns. *North Yarmouth v. Skillings*, 45 Me. 133 (1858); *post*, sec. 187.

To another town in Maine, lands were granted by Massachusetts prior to the separation of Maine therefrom, for the *use of its schools*. The legislature, in 1803, on the application of the town, authorized the sale of the lands, and gave to certain designated *trustees* the right to control the funds raised by the sale of the lands. This was considered as constituting a *contract*, and it was accordingly held that

a subsequent act of the legislature, authorizing the town to choose a new set of trustees, and directing the first trustees to deliver over the trust property, was, agreeably to the principles settled in the Dartmouth College Case, unconstitutional and void. *The Trustees, &c. v. Bradbury*, 11 Me. 118 (1834); *Yarmouth v. North Yarmouth*, 34 Me. 411 (1852). In this last case the trustees of the funds were a *private* corporation, and not subject to legislative control. In *North Yarmouth v. Skillings*, 45 Me. 133 (1858), the trustees of the property or fund in question were a *public* corporation, and subject to such control. The rule as to private and public corporations is well exemplified in these two cases. See, also, *Norris v. Abingdon Academy*, 7 Gill & Johns. (Md.) 7; *Bass v. Fontleroy*, 11 Tex. 698; *Louisville v. University of Louisville*, 15 B. Mon. 642.

In *The State v. Springfield Township*, 6 Ind. (Porter) 83 (1854), it was held that a law of the State (act of 1852), so far as it diverted the proceeds of the sale of the sixteenth section (granted by act of Congress of April 19, 1816) from the use of schools in the *congressional* township where the land was situated, to the use of the school system of the State at large, was in contravention of that section of the State Constitution (sec. 7, art. viii.) which provides, that "all trust funds held by the State shall remain inviolate, and be faithfully and exclusively applied to the purpose for which the trust was created."

That the legislature *cannot in dividing a town* violate the provisions of the donor of a fund held by a municipality in specific trusts is affirmed by the Supreme Court of New Hampshire in a recent judgment. The case was this: In 1856 the town of M. received from John Boynton the sum of \$10,000 as a fund for the support of its public schools, on the express condition that, *unless* the income thereof should be forever divided and applied, according to the number of scholars between the ages of five and fifteen in the several schools or districts of the town, the fund should be repaid to the donor, his executors, administrators, or assigns. In 1872, the town of G. was created by act of the legislature out of part of the territory and inhabitants of M., and it was provided that all property, real and personal, and all school and other funds belonging to the original town of M. should be divided in the proportion of seven to M. and thirteen to G. It was held that the legislature had no constitutional power to direct a division or distribution of the fund different from that prescribed by the donor; and that, therefore, no legal provision for the division of the fund in controversy having been made, the rights of the town of M. therein were unaffected by the act, and the new town of G. was not entitled to any portion of the fund or income. *Greenville v. Mason*, 53 N. H. 515 (1873); *post*, sec. 187, note.



## CHAPTER V.

## MUNICIPAL CHARTERS.

*General Municipal Powers.— Their Nature and Construction.*

§ 81 (48). **Subject outlined.**— This chapter will treat of *Municipal Charters* and the *principles upon which they are construed*, and of the *general nature of the powers* which they confer upon the corporation or upon its legislative or governing body. The subject will be considered under the following heads:—

1. Charters defined. § 82.
2. Judicially noticed. § 83.
3. Proof of Corporate Existence. § 84.
4. Repeal and Amendment of Charters. §§ 85, 86.
5. Conflict between General Laws and Special Charters. §§ 87, 88.
6. Extent of Corporate Powers, Limitations thereon, and Canons of Construction. §§ 89, 90, 91.
7. Usage as affecting Powers and their Interpretation. §§ 92, 93.
8. Discretionary Powers. §§ 94, 95.
9. Public Powers incapable of Delegation. § 96.
10. Public Powers cannot be surrendered or bargained away. § 97.
11. Imperative and Discretionary Powers. §§ 98, 99.
12. Exemption of Revenues from Judicial Seizure, and herein of Garnishment. §§ 100, 101.

§ 82 (49). **Charters defined.**— We have before seen that *in this country* municipal corporations are created by legislative act, either in the form of a special legislative charter or under general incorporating statutes.<sup>1</sup> A MUNICIPAL CHARTER granted *by the crown in England* is a written instrument in the form of letters-patent, with the Great Seal appended to it, addressed to all the subjects, and constituting the persons therein named and their successors a body corporate for or within the place therein specified, and prescribing the powers and duties of the corporation thereby created. But such charters are inoperative until accepted.<sup>2</sup> But in this country, as

<sup>1</sup> *Ante*, secs. 39, 41.

<sup>2</sup> *Ante*, secs. 32, 44. Outline of charter of the Middle Ages, *ante*, sec. 6.

we have elsewhere shown, the *legislature* creates, alters, and, in the absence of constitutional restriction, can repeal charters and incorporating statutes and abolish municipal and public corporations at its will, and it invests them with such powers, mandatory and discretionary, and requires of them such duties, as it deems most expedient for the general good, and for the benefit of the particular locality.<sup>1</sup> No *precise form of words* is necessary to create a corporation, and a corporation may be created by implication.<sup>2</sup>

§ 83 (50). **Charters judicially noticed.**— Courts will judicially notice the *charter or incorporating act* of a municipal corporation without being specially pleaded, not only when it is declared to be a *public statute*, but when it is *public or general in its nature or purposes*, though there be no express provision to that effect.<sup>3</sup> But the *acts, votes, and ordinances* of the corporation are not public matters, and must, unless otherwise provided by statute, be pleaded and proved.<sup>4</sup>

<sup>1</sup> Weeks v. Gilmanton, 60 N. H. 500. *Ante*, secs. 8, 9, 22.

<sup>2</sup> *Ante*, secs. 3, 42, 43.

<sup>3</sup> Albritten v. Huntsville, 60 Ala. 486; Smoot v. Wetumpka, 24 Ala. 121; Case v. Mobile, 30 Ala. 538; Perryman v. Greenville, 51 Ala. 510; Montgomery v. Wright, 72 Ala. 411; Selma v. Perkins, 68 Ala. 145; Montgomery v. Hughes, 65 Ala. 201; Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611; Potwin v. Johnson, 108 Ill. 70; Dwyer v. Brenham, 65 Tex. 526; Solomon v. Hughes, 24 Kan. 211; State v. Tosney, 26 Minn. 262; Durch v. Chippewa Co., 60 Wis. 227; Smith v. Janesville, 52 Wis. 680. In *Indiana*, if a city is a party to a suit and the pleadings do not show otherwise, the presumption is that it is incorporated under the general incorporation law. House v. Greensburg, 93 Ind. 533.

<sup>4</sup> Beatty v. Knowles, 4 Pet. (U. S.) 152, 157 (1830); Stier v. Oskaloosa, citing and approving text, 41 Iowa, 353; Ingle v. Jones, 43 Iowa, 286 (1876); Aldermen v. Finley, 5 Eng. (10 Ark.) 423 (1850); Fauntleroy v. Hannibal, 1 Dillon C. C. 118 (1871); Prell v. McDonald, 7 Kan. 426 (1871); s. c. 7 Am. Rep. 423; West v. Blake, 4 Blackf. (Ind.) 234 (1836); Briggs v. Whipple, 7 Vt. 15, 18 (1835); Case v. Mobile, 30 Ala. 538

(1857); Clarke v. Bank, 5 Eng. (10 Ark.) 516; State v. Mayor, 11 Humph. (Tenn.) 217 (1850); see Vance v. Bank, 1 Blackf. (Ind.) 80, and note (2); 6 Bac. Abr. 374, note; Young v. Bank, &c., 4 Cranch, 384; Swails v. State, 4 Ind. 516 (1853); Portsmouth, &c. Co. v. Watson, 10 Mass. 91; Clapp v. Hartford, 35 Conn. 66; People v. Potter, 35 Cal. 110, where a city is incorporated *under a general act*, the fact of its corporate character must be averred and proved. Ingle v. Jones, 43 Iowa, 286 (1876); *post*, sec. 177, note; Morgan v. Atlanta, 77 Ga. 662. A city charter being declared to be a public act, *supplements and amendments* to it are likewise public. Newark Bank v. Assessors, 30 N. J. L. 22; State v. Bergen, 34 N. J. L. 439; New Jersey v. Yard, 95 U. S. 112 (1877). See *post*, chapter on Ordinances, sec. 422. Where a *public law* creates the mayor and aldermen an incorporated body, no averment or proof is necessary to establish the existence of the corporation. State v. Mayor, 11 Humph. (Tenn.) 217 (1850); State v. Helmes (prescriptive corporations), Pen. (N. J.) 1050; Hawthorne v. Hoboken (supplemental act), 3 Vroom, 32 N. J. L. 172; Stevens Co. v. Railroad Co., 4 Vroom, 33 N. J. L. 229; Bowie v. Kansas City, 51 Mo. 454 (1873).

§ 84 (51). **Proof of corporate Existence; User; Legislative Recognition.** — The *primary evidence* of a special charter or act of incorporation in this country is the original or an authenticated copy, or, under statute regulation, a printed copy published by authority. But if primary evidence cannot be had, *parol or secondary evidence* of its existence is admissible.<sup>1</sup> Thus, where a public corporation had existed for a long space of time (in the instance before the court, for forty years), the court allowed evidence of its incorporation *by reputation*, the original act not being found, and it being probable that it had been destroyed by fire.<sup>2</sup> So evidence that a town has for *many years exercised corporate privileges*, no charter after search being found, is competent to go to the jury to establish that it was duly incorporated. And where there is no direct or record evidence that a place has been incorporated, and it is sought to show the fact of incorporation from circumstantial evidence, the question is ordinarily for the jury, and not the court; that is, the jury, under the circumstances determine whether there is or is not sufficient ground to *presume a charter or act of incorporation*,<sup>3</sup> or the due establishment and existence of a corporate district under some general act.<sup>4</sup> So corporate existence may be

<sup>1</sup> Stockbridge v. West Stockbridge, 12 Mass. 400 (1815); Braintree v. Battles, 6 Vt. 395 (1834); Blackstone v. White, 41 Pa. St. 330.

<sup>2</sup> Dillingham v. Snow, 5 Mass. 547 (1809); s. p. Bassett v. Porter, 4 Cush. 487 (1849). In view of the defective manner in which the records of *quasi* corporations — such as school and road districts, and the like — are kept, the courts, in the absence of any statute requiring record evidence, will permit the existence and organization of the corporation to be proved by *reputation and acts*, where these facts do not appear of record. Barnes v. Barnes, 6 Vt. 388 (1834); Londonderry v. Andover, 28 Vt. 416, (1856); Sherwin v. Bugbee, 16 Vt. 439; Ryder v. Railroad Co., 13 Ill. 523; Highland Turnpike v. McKean, 11 Johns. 154; Owings v. Speed, 5 Wheat. 420. See chapter on Corporate Records and Documents, *post*.

Irregularities in the proceedings to organize a corporation are not favored when set up long afterwards to defeat the corporate existence. Jameson v. People, 16 Ill. 257 (1855); Dunning v. Railroad Co., 2 Ind. 437 (1850); Fitch v. Pinckard, 4 Scam. 5 Ill. 76.

Where a corporation is created, and declared to exist as such, by the legislature without condition, proof of *organization or user* is not necessary to enable it to maintain an action. Cahill v. Insurance Company, 2 Doug. (Mich.) 124; Fire Department v. Kip, 10 Wend. 266 (1833). And see Proprietors, &c. v. Horton, 6 Hill (N. Y.), 501; People v. President, 9 Wend. 351; Wood v. Bank, 9 Cowen, 194, 205. When construed to be *immediately created*, the omission to do certain acts prescribed to organize the institution, was held immaterial as respects persons contracting with the corporation. Brouwer v. Appleby, 1 Sandf. 158 (1847); s. p. People v. President, 9 Wend. 351. See also *ante*, sec. 44.

<sup>3</sup> New Boston v. Dumbarton, 15 N. H. 201 (1844); Mayor of Kingston v. Horner, Cowp. 102, *per* Lord Mansfield; Worley v. Harris, 82 Ind. 493. Where the *fact of incorporation* arises as a *collateral question*, it is only necessary to show that a city is *de facto* a corporation. Louisville N. A. & Chic. Ry. Co. v. Shires, 108 Ill. 617.

<sup>4</sup> Bassett v. Porter, 4 Cush. 487 (1849); New Boston v. Dumbarton, 12 N. H. 409, 412 (1841); s. c. 15 N. H. 201; Robie v.

inferred and judicially noticed, although the incorporating act or charter cannot be found, if the fact of incorporation is clearly *recognized by subsequent legislation* not in contravention of any constitutional provision respecting the mode of creating corporations.<sup>1</sup>

§ 85 (52). **Repeals and Amendments, and their Effect.**—The powers conferred upon municipal corporations may at any time be altered or repealed by the legislature, either by a *general law* operating upon the whole State, or, in absence of constitutional restriction, by a *special act*.<sup>2</sup> A charter may be amended, the name of the

Sedgwick, 35 Barb. 319 (1861). The exercise of corporate powers by a place for twenty years, without objection, and with the knowledge and assent of the legislature, furnishes conclusive evidence of a charter, which has been lost; or, in other words, of a corporation by prescription, which supposes a grant. *Bow v. Allentown*, 34 N.H. 351 (1857). In this case it was also held that an act of incorporation subsequently passed does not raise any conclusive presumption that the town was not before incorporated. *Long use and acquiescence* are evidence in support of the legal existence of a municipal corporation. *People v. Farnham*, 35 Ill. 562; *Jameson v. People*, 16 Ill. 257 (1855); *People v. Maynard*, 15 Mich. 463 (1867). Long acquiescence in the proceedings of a school district is presumptive evidence of the regular organization of such district. *Sherwin v. Bugbee*, 16 Vt. 439 (1844); *Londonderry v. Andover*, 28 Vt. 416. "It is now well settled in this State, that the mere fact of a school district maintaining its existence and operation for a great number of years—say fifteen—is sufficient evidence of its regular organization. The same rule of presumption must be applied to the subdivision of the town into districts." *Per Redfield, J.*, in *Sherwin v. Bugbee*, *supra*.

<sup>1</sup> *Jameson v. People*, 16 Ill. 257 (1855); *Swain v. Comstock*, 18 Wis. 463 (1864); *People v. Farnham*, 35 Ill. 562; *Bow v. Allentown*, 34 N.H. 351 (1857); *Society, &c. v. Pawlet*, 4 Pet. 480 (1830); *Railroad Co. v. Chenoa*, 43 Ill. 209; *Virginia City v. Mining Co.*, 2 Nev. 86 (1866); *Railroad Co. v. Plumas County*, 37 Cal. 354; *ante*, sec. 42.

<sup>2</sup> *Meriwether v. Garrett*, 102 U.S. 472;

*Sloan v. State*, 8 Blackf. (Ind.) 361 (1847), approving *People v. Morris*, 13 Wend. 325; *Daniel v. Mayor, &c.* 11 Humph. (Tenn.) 582; *State v. Mayor*, 24 Ala. 701 (1854); *Girard v. Philadelphia*, 7 Wall. 1 (1868); *State v. Troth*, 5 Vroom (34 N.J.L.), 379; *Worthley v. Steen*, 43 N.J.L. 542; *Wallace v. Trustees*, 84 N.C. 164; *post*, secs. 171, 172; *State v. Palmer*, 4 N.W. Rep. 966; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396; *ante*, secs. 45, 52 *et seq.* *Crook v. People*, 106 Ill. 237; *Churchill v. Walker*, 68 Ga. 681. The adoption of a new State Constitution does not abrogate a special charter unless in conflict with it. *People, ex rel. Mills v. Jones*, 7 Col. 475. The power of the legislature to amend a special charter is not impaired by the fact that the charter has been continued in force by a new Constitution of the State. *Wiley v. Bluffton*, 111 Ind. 152. The provisions of an amendatory act reducing the number of councilmen, though the act took effect at once, were postponed until the next year, when they could be called into requisition at the election,—no earlier election being provided for; and meanwhile the existing council remained unaffected by the amendment. *Scovill v. Cleveland*, 1 Ohio St. 126 (1853). Same principle applied. *Reading v. Keppleman*, 61 Pa. St. 233 (1869).

A legislative amendment to charter abolishing assistant aldermen, and declaring board of aldermen to be common council, is a valid exercise of legislative authority; a public corporation's charter being always subject to legislative amendment or alteration. *Demarest v. New York*, 74 N.Y. 161. An act repealing a charter and imposing upon the sheriff of

place and of the governing body may be changed, and its boundaries altered, while in law the corporation remains the same.<sup>1</sup> The *insertion in an amended charter of the same provisions* that were contained in the old is not, unless such upon the whole act appears to have been the intention of the legislature, a repeal of the latter. The law on this subject is thus stated: "Where a statute does not, in express terms, annul a right or power given to a corporation by a former act, but only confers the same rights and powers under a new name, and with additional powers, such subsequent act does not annul the rights and powers given under the former act and under its former name," there being no express repeal.<sup>2</sup> The change of a city charter does not affect existing ordinances in harmony with new provisions.<sup>3</sup>

**§ 86 (53). Repeating Clause; Substitutionary Charter; Repeals by Implication** — *A repeating clause in a revised and amendatory*

the county the duty of enforcing its ordinances as the town marshal might have done, held valid. *Rose v. Hardee*, 98 N. C. 44. Where a town was incorporated under a general act and afterwards accepted and organized under a special charter, it was held that *the repeal of the special charter did not revive its incorporation under the general act, and that it was no longer a municipal corporation.* *Burk v. State*, 5 Lea (Tenn.), 349.

<sup>1</sup> *Wood v. Board of Election*, 58 Cal. 561; *post*, secs. 171, 182 *et seq.*; *State, ex rel. v. White*, 20 Neb. 37, holding that a mere change of a city from one grade to another, under the general law of Nebraska, does not change the corporation itself, and that, in consequence, a police judge elected before the change was made was entitled to hold his office for the full term for which he was elected. To same effect, *State v. Hedlund*, 16 Neb. 566. See *post*, sec. 172.

<sup>2</sup> *State, &c. v. Mobile*, 24 Ala. 701 (1854); *Girard v. Philadelphia*, 7 Wall. 1 (1868); *Broughton v. Pensacola*, 93 U. S. 266 (1876). Approving *Milner's Adm. v. Pensacola*, 2 Woods, 632; *Laird v. De Soto*, 22 Fed. Rep. 421; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396. Approving text. *Commonwealth v. Worcester*, 3 Pick. (Mass.) 474 (1826); *Grant on Corp.* 24, and cases cited; *Id.* 305. See chapter on Dissolution, *post*. "There is no doctrine better settled," says Mr.

Justice Strong, "than that a change in the form of government of a community does not *ipso facto* abrogate pre-existing law, either written or unwritten. This is true in regard to what is strictly municipal law, even when the change is by conquest. The act of assembly converting a borough into a city did not, therefore, of itself, and in the absence of express provisions to that effect, either repeal the former acts of assembly relative to the borough, or annul existing ordinances. It was solely a change in the organic law for the future, and left unaffected the existing ordinances, precisely as a change of a State Constitution leaves undisturbed all prior acts of assembly." *Trustees of Academy v. Erie*, 31 Pa. St. 515, 517 (1858). As to transfer to new or reorganized corporation of the property and rights of the old or former corporation, see *Girard v. Philadelphia*, 7 Wall. 1 (1868); *Savannah v. Steamboat Company*, R. M. Charl. (Ga.) 342; *Fowle v. Alexandria*, 3 Pet. 398, 408; *Municipality v. Commissioners*, 1 Rob. (La.) 279. Transition from town to city organization does not dissolve the corporation or extinguish its indebtedness. *Olney v. Harvey*, 50 Ill. 453 (1869); *Maysville v. Shultz*, 3 Dana, 10 (1865); *Frank v. San Francisco*, 21 Cal. 668; *post*, chap. vii. secs. 171, 172.

<sup>3</sup> *Chamberlain v. Evansville*, 77 Ind. 542; *Trustees of Academy v. Erie*, *supra*.

*charter* whereby a former provision is included in the revised act, does not, as to such provision, interrupt the continuity of the original act.<sup>1</sup> Where the original charter of a city prescribed the qualifications required to make a person eligible to the office of mayor, and contained a proviso that a certain fact disqualified, and an amendatory act, in dealing in the same subject, *copied all of the original act except the proviso, which was omitted*, the court held that the proviso in the original act was not repealed, placing stress, however, upon the express declaration that all parts of the new act inconsistent with or contrary to the old one were repealed. There is, however, much room to contend that the subject-matter having been revised in the amendatory act *in the manner it was*, the legislative intention was to repeal, and not to continue in force, the proviso.<sup>2</sup> A general law forbidding the opening of streets through cemeteries is not repealed by a subsequent act extending the limits of a town, and appointing commissioners with authority "to survey, lay out, &c., streets and alleys, as they shall deem necessary within said limits," since both acts can stand, and *repeals by implication* are not favored.<sup>3</sup> So a general statute, expressly prohibiting a municipal corporation from debarring citizens from selling at wholesale in the city market, is not repealed by implication by a subsequent act, by which the city authorities are invested with power to pass such ordinances as appear to them necessary for the security, welfare, &c., of the city.<sup>4</sup> So, also, where a *State statute* required auctioneers to take out a *State* license, and a subsequent charter to a city gave it power "to provide for licensing, taxing, and regulating auctions," &c., it was held that a license granted by the city corporation to an auctioneer did not relieve him of the necessity of obtaining, also, a license from the State authorities, the court being of opinion that both statutes could and ought to stand, as they were not inconsistent.<sup>5</sup>

<sup>1</sup> *St. Louis v. Alexander*, 23 Mo. 483 (1856).

<sup>2</sup> *State v. Merry*, 3 Mo. 278 (1833). Consult *Goodenow v. Buttrick*, 7 Mass. 140, 143; *King v. Grant*, 1 Barn. & Adol. 104. Where a *later statute undertakes to revise the entire subject-matter of a prior statute*, it will generally be taken as intended to be a substitute for the former statute unless a contrary purpose appears. It is entirely a question of legislative intention. *Murdock v. Memphis*, 20 Wall. 590, 617, and cases cited. Sedgwick on

Stats. 126; *Bank v. Bridge*, 1 Vroom (30 N. J. L.), 112; *Industrial School v. Whitehead*, 2 Beasley, N. J. 290; *State v. Kelly*, 5 Vroom (34 N. J. L.), 75.

<sup>3</sup> *Egypt Street*, 2 Grant (Pa.) Cas. 455 (1854). See, further, *infra*, sec. 87, as to *repeals by implication*.

<sup>4</sup> *Haywood v. Savannah*, 12 Ga. 404 (1853).

<sup>5</sup> *Simpson v. Savage*, 1 Mo. 359 (1823); *infra*, sec. 87. Text approved. *Siebenhauer, In re*, 14 Nev. 365.

§ 87 (54). **General Laws and Special Charters; Repeals by Implication; Conflict; Construction.** — It is a principle of very extensive operation that *affirmative statutes of a general nature do not repeal by implication charters and special acts* passed for the benefit of particular municipalities;<sup>1</sup> but they do so when this clearly appears to have been the purpose of the legislature. If both the general and the special acts can stand, they will be construed accordingly. If one *must* give way it will depend upon the supposed intention of the law-maker, to be collected from the entire legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality, in exclusion of the general enactments. So particular provisions of charters should be read and construed in the light of the whole instrument, of all preceding charters, of the general legislation of the

<sup>1</sup> *Bond v. Hiestand*, 20 La. An. 139; *Railroad Co. v. Alexandria*, 17 Gratt. (Va.) 176 (1867); *Hammond v. Haines*, 25 Md. 541; *Louisville v. McKean*, 18 B. Mon. 9; *Cumberland v. Magruder*, 34 Md. 381 (1871); *Comm'r's Central Park, In re*, 50 N. Y. 493 (1872); *Mayor v. Inman*, 57 Ga. 370 (1876); *post*, secs. 137, 162; *State, ex rel. v. Wilson*, 12 Lea (Tenn.), 246; *Wood v. Board of Election*, 58 Cal. 561; *East St. Louis v. Maxwell*, 99 Ill. 439. A provision in a *new State Constitution* held to remove a limitation in a municipal charter upon the power of taxation for the payment of bonded indebtedness. *East St. Louis v. Amy*, 120 U. S. 600. In *Donahue v. Graham*, 61 Cal. 276, a "street law" contained in a city charter which was inconsistent with the provisions of a *new Constitution*, was held to be repealed by it. *Repeals by implication are not favored*; and special laws conferring particular rights upon municipal corporations were held not to be repealed by subsequent statutes general in their character. *Ottawa v. County*, 12 Ill. 339; *Egypt Street*, 2 Grant (Pa.) Cas. 455 (1854); *Harrisburgh v. Sheek*, 104 Pa. St. 53; *supra*, sec. 87. A general statute, repealing all acts contrary to its provisions, held not to repeal a clause in the charter of a municipal corporation upon the same subject. *State v. Branin* (taxation), 3 Zab. (23 N. J. L.), 484 (1852). But a general railroad tax law held to repeal by implication prior special charter powers of municipalities. "It is really

a question of intention," says *Wagner, J.*, and the intention was regarded as manifest from the scope and purpose of the whole act, although negative words, or words of repeal, were not used. *State v. Sevarance*, 55 Mo. 378 (1874); *Union Pacific Ry. Co. v. Cheyenne*, 113 U. S. 516 (1884); *post*, sec. 770.

The principle that *general legislation* on a particular subject must, in the absence of anything showing a different intent on the part of the legislature, give way to *inconsistent special legislation* on the same subject, is recognized and applied in the following cases. *State v. Morristown*, 33 N. J. Law, 57 (1868); *Cross v. Morristown*, 3 C. E. Green (18 N. J. Eq.), 305; *State v. Trenton*, 7 Vroom (36 N. J. L.), 198, 201; *State v. Branin*, 3 Zab. (23 N. J. L.) 484; *State v. Clark*, 1 Dutch. (N. J.) 54; *State v. Jersey City*, 5 Dutch. 170; *Jersey City v. Railroad Co.*, 20 N. J. Eq. 360; *Goddard, In re*, 16 Pick. 504; *Railroad Co. v. Alexandria*, *supra*. In *Bank v. Bridges*, 1 Vroom (30 N. J. L.), 112, and *State v. Miller*, *Id.* 368, special laws gave way to general laws, because the legislature had annexed to the latter a repealing clause abrogating all inconsistent local or special acts. *Per Depue, J.*, 33 N. J. 57, 60. See *Bank v. Davis*, 1 McCarter Ch. (N. J.) 286; *Clintonville v. Keeting*, 4 Denio, 341; *Tierney v. Dodge*, 9 Minn. 166. Other illustrations will be found in the chapters on Ordinances and Taxation, *post*, sec. 773; *ante*, sec. 86.

State, and of the object of the legislature in the erection of municipalities, as before explained.<sup>1</sup>

§ 88. **Implied Repeal of General Laws.** — The presumption is not lightly to be indulged that the legislature has *by implication repealed*, as respects a particular municipality, or as respects all municipalities, *laws of a general nature*, elsewhere in force throughout the State; yet a charter or special act passed subsequent to the general law, and plainly irreconcilable with it, will to the extent of the conflict operate a repeal of the latter by implication. But by a well-known rule, founded on solid reasons, such repeals are not favored; and the principle of implied repeals ought to be applied with extreme caution.<sup>2</sup>

<sup>1</sup> *Alexander v. Alexandria* (taxing power), 5 Cranch, 2 (1809); *Grant on Corp.* 27; *Canal Company v. Railroad Company*, 4 Gill & Johns. 1; *Smith v. Kernochen*, 7 How. 198; *Janesville v. Markoe*, 18 Wis. 350; *Powell v. Parkersburg*, 28 W. Va. 698; *Thomason v. Ashworth*, 73 Cal. 73; *Babcock v. Helena*, 34 Ark. 499; *Eichels v. Evansville Street Ry. Co.*, 78 Ind. 261; *Chicago Dock Co. v. Garrity*, 115 Ill. 155. Where there was a *charter provision in reference to bribery* committed by a municipal officer, and the *same crime* was made punishable by a greater penalty in a *code subsequently adopted* by the legislature, it was held that, as to crimes committed after the code was adopted, the charter provision was repealed. *People v. Jaehne*, 103 N. Y. 182; *People v. O'Neil*, 109 N. Y. 251; *ante*, secs. 9, 22, 29. *Acts in pari materia* should be construed together; and on this principle, the definition of the word "owner," in a subsequent paving act, was considered as proper to be adverted to, and as applicable to the same word in *prior* acts on the same subject. *Holland v. Baltimore*, 11 Md. 136 (1857); *New Bedford & F. Street Ry. Co. v. Acushnet Street Ry. Co.*, 143 Mass. 200; *Moran v. Long Island City*, 101 N. Y. 439. Where a *city charter adopted the general revenue act* as to the mode of assessing and collecting municipal taxes, the subsequent repeal of the revenue act and the passage of a general law concerning the creation and government of municipalities, which contained provisions for assessing and col-

lecting their taxes, was held not to alter the powers and practice of the city under its charter. *People v. Clunie*, 70 Cal. 504. When *general revenue laws* are applicable to incorporated places, see *post*, secs. 770-774. Provisions in a *city charter inconsistent with amendments to the Constitution* of the State afterwards adopted are void. *Public School Trustees v. Taylor*, 30 N. J. Eq. 618.

<sup>2</sup> See cases cited to last preceding section; also, *St. Louis v. Alexander*, 23 Mo. 483; *Baldwin v. Green*, 10 Mo. 410; *State v. Binder*, 38 Mo. 451; *State v. Young* (intoxicating liquors), 17 Kan. 414 (1877) (where the Kansas cases on the subject are discussed by *Horton*, C. J.); *State v. Clarke*, 1 Dutch. (N. J.) 54; *State v. Douglass*, 4 Vroom (33 N. J. L.), 363; *State v. Mills*, 5 Vroom (34 N. J. L.), 177, 180; *Montezuma v. Minor*, 70 Ga. 191; *St. Johnsbury v. Thompson*, 59 Vt. 300. The case of *The State v. Clark*, 54 Mo. 17 (1873), s. c. 14 Am. Rep. 471, and of *The State v. De Bar*, 58 Mo. 395 (1874), relating to the *social evil* powers of the city of St. Louis, are highly instructive on the question on the effect of a special act upon the general law. In each case the defendant was indicted under the general criminal code of the State, which prohibited the keeping of bawdy houses. In the first case the defendant pleaded a license from the city to keep such a house. In 1870 the charter of the city was amended, and the previous power to "suppress" such houses was changed to the power "to pass ordinances," not inconsistent with any law of



§ 89 (55). **Extent of Power; Limitations; Canons of Construction.** — It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation, — not simply convenient, but indispensable.<sup>1</sup> Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.<sup>2</sup> Of

the State, to *regulate* or *suppress*" such houses. Under this power to regulate, the city regulated such houses by passing an order licensing them; and such an ordinance was held to be valid notwithstanding the general law, and to have the effect to prevent the enforcement of the general criminal law of the State within the city of St. Louis. The question was a close one, but the majority opinion of *Napton, J.*, in view of the legislation recited in it, seems to be sound. *State v. Clark*, 54 Mo. 17 (1873). The next year, 1874, in consequence of the decision, the charter of the city was amended in this respect, by substituting the words "to suppress, but not to *license*, bawdy houses." After this act went into effect the *State v. De Bar, supra*, arose. The defendant was indicted under the general law of the State for keeping such a house. There was another provision in the general law, that the repeal of a law shall not by implication revive a former law. And it was held by a majority of the court that the amendment of 1874, which repealed the former amendment of 1870, did not thereby revive the general criminal statute in the city of St. Louis, and, as a consequence, that the defendant could not be convicted. This last decision seems to the author to be erroneous, on the ground that the act of 1870 did not *ipso facto* repeal the general law in the city, but such repeal, or suspension rather, was only effected when the city passed the ordinance. If so, a repeal of the ordinance by the council, without the act of 1874, would have left the general law of the State in force within the city, and its repeal by the act of 1874 would have precisely the same effect. These cases may be usefully consulted on the nature and scope of the

power to "*regulate*." See also *Givens v. Van Studdiford*, 86 Mo. 149. General power in a municipal charter held not to repeal by implication the chartered rights of a railroad company. *State v. Jersey City*, 5 Dutch. 170. Or to interfere with vested rights. *State v. Jersey City*, 5 Vroom (84 N. J. L.), 32.

A charter which confers *exclusive* jurisdiction upon municipal authorities operates to repeal the general law on the same subject within the municipality; not so ordinarily when the charter confers concurrent authority. See *Seebold v. People*, 86 Ill. 33 (1878).

<sup>1</sup> *Smith v. Newbern*, 70 N. C. 14 (1874); s. c. 16 Am. Rep. 766. Referring to the text, *McAllister, J.*, in *People v. Howard*, not officially reported, says, "It is the best summary of all the decisions upon that point to be found in all the books." Text cited and approved in the following cases: *Cook Co. v. McCrea*, 93 Ill. 236; *Ottawa v. Carey*, 108 U. S. 110; *Kelly v. Town of Milan*, 21 Fed. Rep. 842; *Scott v. Shreveport*, 20 Fed. Rep. 714; *Desmond v. City of Jefferson*, 19 Fed. Rep. 483; *In re Lee Tong*, 18 Fed. Rep. 253; *City of Eufaula v. McNab*, 67 Ala. 588; *Henke v. McCord*, 55 Iowa, 378; *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118; *City of Corvallis v. Carlile*, 10 Oreg. 139; *Danville v. Shelton*, 76 Va. 325; *Bell v. Platteville*, 71 Wis. 139; *Gilman v. Milwaukee*, 61 Wis. 588; *Blake v. Walker*, 23 S. C. 517; *Charleston v. Reed*, 27 W. Va. 681; *City of Kansas v. Swope*, 79 Mo. 446; *City of Portland v. Schmidt*, 13 Oreg. 17; *Levy v. Salt Lake City*, 3 Utah, 63; *Richmond v. McGirr*, 78 Ind. 192, 197 (1881).

<sup>2</sup> Text quoted with approval. *Williams v. Davidson*, 43 Tex. 33; *Brenham*

every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void.<sup>1</sup> Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations. Their reasonableness, their necessity, and their salutary character have been often vindicated, but never more forcibly than by the late learned Chief-Justice Shaw, who, speaking of municipal and public corporations, says: "*They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. This principle is derived from the nature of corporations, the mode in which they are organized, and in which their affairs must be conducted.*"

§ 90. **Same subject.**—"In aggregate corporations, as a general rule," continues Chief-Justice Shaw, "the act and will of a majority is deemed in law the act and will of the whole,—as the act of the

*v. Water Co.*, 67 Tex. 542; *Hanger v. Des Moines*, 54 Iowa, 193; *City of Corvallis v. Carlile*, 10 Oreg. 139; *Kirkham v. Russell*, 76 Va. 956; *Tax Collector v. Dendinger*, 38 La. An. 261.

<sup>1</sup> *McCann v. Otoe Co.*, 9 Neb. 324; *Stewart v. Otoe Co.*, 2 Neb. 177; *S. C. & P. R. R. Co. v. Washington Co.*, 3 Neb. 42; *Somerville v. Dickerman*, 127 Mass. 272; *Boylston Market v. Boston*, 113 Mass. 528; *Harvard College v. Boston*, 104 Mass. 470; *Brimmer v. Boston*, 102 Mass. 19; *People v. Webber*, 89 Ill. 347; *Bryan v. Page*, 51 Tex. 532; *Francis v. Troy*, 74 N. Y. 338; *State v. Passaic*, 41 N. J. L. 90; *Perrine v. Farr*, 2 Zab. (22 N. J. L.) 356; *Carron v. Martin*, 2 Dutch. (N. J.) 594; *State v. Hudson*, 5 Dutch. (N. J.) 104; *State v. Marion Co.*, 21 Kan. 419; *Green v. Cape May*, 41 N. J. L. 45; *Lord v. Oconto*, 47 Wis. 386; *Garvey, In re*, 77 N. Y. 523; *Smith v. Newburgh*, 77 N. Y. 130; *Allen v. Galveston*, 51 Tex. 302; *Dore v. Milwaukee*, 42 Wis. 18; *Butler v. Nevins*, 88 Ill. 575; *Kansas City v. Flanagan*, 69 Mo. 22; *Bentley v.*

*County Comm'rs*, 25 Minn. 259; *Fulton v. Lincoln*, 9 Neb. 358; *Hurford v. Omaha*, 4 Neb. 350; *Reis v. Graff*, 51 Cal. 86. Text cited with approval in *Cook Co. v. McCrea*, 93 Ill. 236; *Birmingham & Pratt M. Ry. Co. v. Birmingham Street Ry. Co.*, 79 Ala. 465; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Heiskell v. Baltimore*, 65 Md. 125; *Dwyer v. City of Brenham*, 65 Tex. 526; *St. Johnsbury v. Thompson*, 59 Vt. 300; *Christie v. Malden*, 23 W. Va. 667; *Spengler v. Trowbridge*, 62 Miss. 46 (an appropriation to pay expenses of a committee in endeavoring to obtain legislation from Congress held illegal, and payment enjoined); *Gas Co. v. Parkersburg*, 30 W. Va. 435 (1887). The citizens of a city cannot confer upon its common council powers not granted by charter. *Torrent v. Muskegon*, 47 Mich. 115. Applying the rule in the text, an act authorizing the sale of municipal bonds at not less than par was held not to warrant the allowance of a commission to a purchaser of the bonds from the city at par. *Whelen's Appeal*, 108 Pa. St. 162, 197.

corporate body. The consequence is that a minority must be bound not only without, but against, their consent. Such an obligation may extend to every onerous duty, — to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated, viz., *that corporations can only exercise their powers over their respective members, for the accomplishment of limited and defined objects.* And if this principle is important, as a general rule of social right and municipal law, it is of the highest importance in these States, where corporations have been extended and multiplied so as to embrace almost every object of human concern.”<sup>1</sup> The language of another learned judge on this subject is well chosen, and fittingly supplements that which we have quoted in the preceding section. “In this country,” says Church, J., “all corporations whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. But if we were to say that they can do

<sup>1</sup> *Per Shaw*, C. J., in *Spanlding v. Lowell*, 23 Pick. 71, 74 (1839); *Bangs v. Snow*, 1 Mass. 181; *Stetson v. Kempton*, 13 Mass. 272; *Willard v. Newburyport*, 12 Pick. 227; *Keyes v. Westford*, 17 Pick. 273, 279; *Comm. v. Turner*, 1 Cush. 493, 495 (1848); *Cooley v. Granville*, 10 Cush. 57 (1852); *Merriam v. Moody*, 25 Iowa, 163 (1868); *Minturn v. Larue*, 23 How. 435; *Lafayette v. Cox*, 5 Ind. (Port.) 38 (1854); *Paine v. Spratley*, 5 Kan. 525; *Vincent v. Nantucket*, 12 Cush. 103, 105; *Clark v. Davenport*, 14 Iowa, 494; *Mays v. Cincinnati*, 1 Ohio St. 268; *Gallia Co. v. Holcomb*, 7 Ohio, Part I. 232; *Comm’n’s v. Mighels*, 7 Ohio St. 109; *Fitch v. Pinckard* (taxing power) 4 Scam. (5 Ill.) 78; *Caldwell v. Alton* (market ordinance), 33 Ill. 416; *Trustees, &c. v. McConnell*, 12 Ill. 140; *Louisiana State Bank v. New Orleans Nav. Co.*, 3 La. An. 294; *State v. Mayor, &c.* (market-house case), 5 Port. (Ala.) 279; *Head v. Ins. Co.*, 2 Cranch, 168; *DeRussey v. Davis* (sale of ferry lease), 13 La. An. 468; *People v. Bank, &c.*, 1 Doug. (Mich.) 282; *City Council v. Plank Road Co.*, 31 Ala. 76; *State v. Mayor*, 5 Port. (Ala.) 279; *Burnett, In re*, 30 Ala. 461, and cases

cited; *Le Couteulx v. Buffalo*, 33 N. Y. 333; *Hayes v. Appleton*, 24 Wis. 544; *People v. Railroad Co.*, 12 Mich. 389; *Vance v. Little Rock*, 30 Ark. 435 (1876); *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396. Text approved in the following cases: *Noyes v. Mason*, 5 N. W. R. 595; *Frank, In re*, 52 Cal. 606; *Green v. Cape May*, 41 N. J. L. 45.

“*The powers of all corporations are limited by the grants in their charters, and cannot extend beyond them.*” *Per Breeze*, J., *Petersburg v. Metzger*, 21 Ill. 205. “Corporations have only such rights and powers as are expressly granted to them, or as are necessary to carry into effect the rights and powers so granted.” *Per Storrs*, J., in *New London v. Brainard* (illegal appropriation of money to celebrate Fourth of July), 22 Conn. 552 (1853), approving *Stetson v. Kempton*, 13 Mass. 272; *Hodges v. Buffalo*, 2 Denio, 110. So, where the statute placed the care of fire departments in the hands of chief engineers, a power “to regulate and protect fire engines,” &c., was held not to authorize a city to establish a “fire board” to have charge of that department. *Benjamin v. Webster*, 100 Ind. 15. *Ante*, sec. 29.

nothing for which a warrant could not be found in the language of their charters, we should deny them, in some cases, the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore it has long been an established principle in the law of corporations, that they *may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted*. In doing this, they must [unless restricted in this respect] have a choice of means adapted to ends, and are not to be confined to any one mode of operation.”<sup>1</sup>

§ 91. **Same subject. Principles of Construction.**—The *extent of the powers of municipalities*, whether express, implied, or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary, is, that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the State or general public, and against the State's grantee. The rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipal and public bodies which are out of the usual range, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant. The subject is copiously illustrated in the notes.<sup>2</sup>

<sup>1</sup> Bridgeport v. Railroad Co., 15 Conn. 475, 501 (1843), *per Church, J.* So where power is conferred upon a city council to levy and collect taxes, and no officer for the purpose is provided in the charter, the authority to use and employ the necessary machinery to make the levy and collection was held to be implied. Union Pacific Ry. Co. v. Ryan, 2 Wyo. 408. But see s. c. in Supreme Court of United States, 113 U. S. 516, where the judgment was reversed on other grounds. Express authority to establish and maintain a public bath includes the power to secure a proper location for it. Poillon v. Brooklyn, 101 N. Y. 132. The *incidental powers* of a municipal corporation must be germane to the purposes for which it is created. Mayor v. Yuille, 3 Ala. 137

(license to bakers); Harris v. Intendant, 28 Ala. 577 (retailing liquors); Intendant v. Chandler, 6 Ala. 899 (retailing liquors).

<sup>2</sup> Courts adopt a *strict, rather than liberal construction of powers*: “It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary [fair and reasonable] implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.” Minturn v. Larue, 23 How. 435, 436 (1859). *Per Nelson, J.*, construing municipal charter as to *ferry rights* of corporation there-

The general principles of law, stated in this and in the preceding sections, are indisputably settled, but difficulty is often experienced

under. In subsequent cases, the Supreme Court has said that a municipal corporation "can exercise no power which is not, in *express terms* or by *fair implication*, conferred upon it." *Thomson v. Lee Co.* (municipal bond case), 3 Wall. 320; *Thomas v. Richmond*, 12 Wall. 349 (1871); *s. p.* *Clark v. Davenport*, 14 Iowa, 495; *Merriam v. Moody's Executors*, 25 Iowa, 163; *Nichol v. Mayor, &c.*, 9 Humph. 252; *Leonard v. Canton*, 35 Miss. 189; where *Fisher, J.*, gives a clear exposition of the *rationale* of the doctrine that corporate grants should be strictly construed. *Douglass v. Placerville*, 18 Cal. 643, 647; *Argenti v. San Francisco*, 16 Cal. 282; *Wallace v. San Jose*, 29 Cal. 180. With us, cities, towns, and municipal corporations of all kinds are created and endowed with powers by the legislature. These are of a legislative and administrative character, to aid in the better government of localities or portions of the State. This power exists no further than it has been delegated. And municipal corporations, in their action, are confined "to a *strict construction* of the grants of powers contained in their charters" or acts of incorporation. *Lafayette v. Cox*, 5 Ind. (Porter) 38 (1854). "It is proper, too, that these powers should be strictly construed, considering with how little care chartered privileges are these days granted." *Bank v. Chillicothe*, 7 Ohio, Part II. 31, 35 (1836), *per Hitchcock, J.*; *Collins v. Hatch*, 18 Ohio, 523; *Port Huron v. McCall*, 46 Mich. 565; "Boroughs and towns are, confessedly, inferior corporations. They act not by any inherent right of legislation, like the legislature of the State, but *their authority is delegated*, and their powers, therefore, must be *strictly pursued*. Within the limits of their charter, their acts are valid; without it they are void." *Willard v. Killingworth*, 8 Conn. 247, *per Daggett, J.*, approved 10 Conn. 442. "The action of municipal corporations is to be held strictly within the limits prescribed by statute. Within these limits, they are to be favored by the courts. Powers expressly granted, or necessarily implied,

are not to be defeated or impaired by a stringent construction." *Smith v. Madison*, 7 Ind. 86; *Kyle v. Malin*, 8 Ind. 34; 57, *per Stuart, J.*; *Memphis v. Adams* (implied power to employ an attorney), 9 Heisk. (Tenn.) 518; *s. c.* 24 Am. Rep. 331. *Per Nicholson, C. J.* A municipal corporation has no right to appropriate its revenues to obtain an increase of its powers, through persons sent by the city council to appear before the State General Assembly and Congress. *Henderson v. Covington*, 14 Bush (Ky.), 312; *Spensler v. Trowbridge*, 62 Miss. 46.

In concluding this note, the author may be permitted to observe that the *principle of strict construction* should not be pressed in any case to such an unreasonable extent as to defeat the legislative purpose fairly appearing upon the entire charter or enactment. Perhaps the rule as it is briefly expressed in the text (secs. 90, 91) best embodies the result of the adjudications upon this point, namely: If, upon the whole, there be fair, reasonable, substantial doubt whether the legislature intended to confer the authority in question, particularly if it relates to a matter extra-municipal or unusual in its nature, and the exercise of which will be attended with taxes, tolls, assessments, or burdens upon the inhabitants, or oppress them, or abridge natural or common rights, or divest them of their property, the doubt should be resolved in favor of the citizen, and against the municipality. The rule as here expressed has been cited and approved in *Ex parte Mayor of Florence*, *in re Jones*, 78 Ala. 419; *Grand Rapids Electric, &c. Co. v. Grand Rapids Edison, &c. Co.*, 33 Fed. Rep. 659 (holding that a power to make, amend, and repeal ordinances deemed advisable for *lighting streets* did not confer control of the streets to the exclusion of the legislature, or authorize the city to *grant the exclusive use* of the streets for electric lights for fifteen years). Power to *fill up and drain lots* holding stagnant water, at the expense of their owners, was held not to authorize filling them up to a greater height than was necessary to abate the nuisance. *Bush v.*

in their application, on account of the complex character of municipal duties, and the various, miscellaneous, and frequently indefinite purposes or objects which municipalities are authorized to execute or carry into operation.<sup>1</sup>

*Usage as affecting Municipal Powers and their Construction.*

§ 92 (56). **Usage and Prescription.** — In *England* municipal corporations claim and exercise many powers wholly in virtue of long-established *usage*, or of *prescription*, which implies a lost charter conferring such powers.<sup>2</sup> Indeed, from immemorial usage, powers are recognized as valid which could not lawfully originate in a royal charter. A usage to give a right must, however, be long established, and forty years' duration was not considered of itself to be sufficient for this purpose.<sup>3</sup> But *usage in this country* has a much more limited operation. It is a necessary result of the manner in which our municipal corporations are created — viz., by express legislative act, wherein their powers and duties are wholly prescribed — that the powers themselves cannot be added to, enlarged, or diminished by proof of usage.

§ 93 (57). **Same subject.** — In a case in Massachusetts, the learned Chief-Justice Bigelow, after stating the decision of the Supreme Court, that towns in Massachusetts had no authority to appropriate money for the celebration of the Fourth of July, remarks, in relation to the attempt to sustain the appropriation on the ground of usage: "Usage cannot alter the case. An unlawful expenditure of money by a town cannot be rendered valid by usage, however long continued. Abuses of power and violations of right derive no sanction from time or custom. A casual or occasional exercise of a power by one or a few towns will not constitute usage. It must not only be general and of long continuance, but, what is more important, it must also be a custom necessary to the exercise of some corporate power, or the enjoyment of some corporate right, or which contributes essentially to the necessities and convenience of the inhabitants. The usage relied on in the present case would not satisfy either of these last-named requisites, which are necessary to give it validity."<sup>4</sup> But

Dubuque, 69 Iowa, 233. *Infra*, sec. 109; Logan v. Pyne, 43 Iowa, 524 (1876); s. c. 22 Am. Rep. 261.

<sup>1</sup> Spaulding v. Lowell, 23 Pick. 71; *ante*, secs. 8–28; *post*, ch. vi., where some of these miscellaneous or special powers are considered.

<sup>2</sup> *Ante*, ch. ii. sec. 29; ch. iii. sec. 32.

<sup>3</sup> Chad v. Tilsed, 5 J. B. Moore, 185. As to the proper office of usage in England, both as a source of power and to aid in the interpretation of charters, see Grant on Corp. 19, 27, 28, 29, 552, 564.

<sup>4</sup> Hood v. Lynn, 1 Allen (Mass.), 103 (1861). Further as to usage consult Willard v. Newburyport, 12 Pick. 227; Spaul-

*general and long-continued usage* is not without its importance, and usage of this character may be resorted to *in aid of a proper construction of the charter or statute*, but no further. If the language be uncertain or doubtful, a uniform, long-established, and unquestioned usage will be regarded by the courts in determining the mode in which powers may be exercised, and to a reasonable extent in determining the scope of the powers themselves; but usage can have no room for operation where the language of the enactment is plain and the legislative intent is clear upon the face of it.<sup>1</sup>

§ 94 (58). **Discretionary Powers not subject to Judicial Control.**—

Power to do an act is often conferred upon municipal corporations, in general terms, without being accompanied by any *prescribed mode* of exercising it. In such cases the common council, or governing body, necessarily have, to a greater or less extent, a *discretion as to the manner* in which the power shall be used.<sup>2</sup> This discretion,

ding *v. Lowell*, 23 Pick. 71; *Smith v. Cheshire*, 13 Gray (Mass.), 308 (1859); *Butler v. Charlestown*, 7 Gray, 12, 16 (1856); *Benoit v. Conway*, 10 Allen, 528.

<sup>1</sup> *Smith v. Cheshire*, 13 Gray, 308; *Butler v. Charlestown*, 7 Gray, 12, 16; *Sherwin v. Bugbee* (validity of school meeting), 16 Vt. 439, 444, where *Redfield, J.*, remarks: "In construing statutes applicable to public corporations, courts will attach no slight weight to the *uniform practice* under them, if this practice has continued for a considerable period of time." It is a rule "founded on reason and common sense," says the Court of Appeals of Maryland, that "*doubtful words in a general statute may be expounded with reference to a general usage; and when a statute is applicable to a particular place only, such words may be construed by usage at that place.*" *Frazier v. Warfield* (Inspection Act for Baltimore), 13 Md. 279, 303; *s. p. Love v. Hinckley*, Abt. Adm. 436; see, also, *Rex v. Chester*, 1 Maule & Selw. 101; *Rex v. Salway*, 9 B. & C. 424.

Where the true construction of a charter admits of doubt, and the construction adopted by the city authorities has been acquiesced in generally, and acted upon by third persons in good faith, in their transactions with the city, it will be precluded by the courts in actions by such

third parties from denying its construction to be the true one. *Van Hostrup v. Madison City* (on railroad bonds), 1 Wall. (U. S.) 291 (1863); *Meyer v. Muscatine* (on railroad bonds), *Id.* 384, 391. *Post*, secs. 420, 457, 560 n., 562 n., 591 n.; chaps. xxii. xxiii.

<sup>2</sup> *Railroad Co. v. Evansville* (power to subscribe stock and to borrow money), 15 Ind. 395 (1860); *Kelly v. Milwaukee*, 18 Wis. 83; *Slack v. Railroad Co.*, 13 B. Mon. 1; *Bridgeport v. Railroad Co.*, 15 Conn. 475, 501 (1843), *per Church, J.*; *Harrison v. Baltimore*, 1 Gill (Md.), 264 (1843); *Cincinnati v. Gwynne*, 10 Ohio, 192; *Markle v. Akron*, 14 Ohio, 586. Where a municipal corporation is entrusted with the execution of a power, and is not confined to a particular mode, but has a *discretion* in the choice of means, a *plain case of abuse* must be shown, resulting in an injury to the petitioner, to warrant an injunction against the corporation. *Page v. St. Louis* (special assessment), 20 Mo. 136 (1853); *Colton v. Hanchett*, 13 Ill. 615; *Bush v. Carbondale*, 78 Ill. 74 (1875); *Mayor of Baltimore v. Gill*, 31 Md. 375; *Holland v. Baltimore*, 11 Md. 186; *post*, sec. 146; *Dodd v. Hartford*, 25 Conn. 232; *Sheldon v. School District*, *Id.* 224; *Lockwood v. St. Louis*, 24 Mo. 20; *Deane v. Todd*, 22 Mo. 90; *Mayor, &c., v. Meserole*, 26

where it is conferred or exists, cannot be judicially interfered with or questioned except where the power is exceeded or fraud is imputed and shown, or there is a manifest invasion of private rights. Thus where the law or charter confers upon the *city council*, or *local legislature*, power to determine upon the expediency or necessity of measures relating to the local government, their judgment upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the courts. In such case the decision of the proper corporate body is, in the absence of fraud, final and conclusive, unless they transcend their powers.<sup>1</sup> Thus, for example, if a city has power to *grade streets*, the courts will not inquire into the necessity of the exercise of it, or the refusal to exercise it, nor whether a particular grade adopted, or a particular mode of executing the grade, is judicious.<sup>2</sup> So if a city has power to *build*

Wend. 132; *Union Pacific Ry. Co. v. Ryan*, 2 Wyo. 408; s. c. on appeal *sub nom.* *Union Pacific Ry. Co. v. Cheyenne*, 113 U. S. 516; *Poillon v. Brooklyn*, 101 N. Y. 132. A power "to remove or confine persons having infectious or pestilential diseases" confers authority to select the means of carrying it out, and a city may, under such a power, rent a house to be used as a small-pox hospital. *Anderson v. O'Conner*, 98 Ind. 168. See chapters on Contracts and Taxation, *post*; *Wells v. Atlanta*, 43 Ga. 67 (1871); *Coulson v. Portland*, Deady R. 481 (1868); *post*, sec. 112, also ch. xxiii. In respect to the legislative functions of a municipal body, the courts are bound to presume that they will exercise any discretion with which they are clothed properly, and that they had sufficient reasons for doing an act, the result of such discretion. *Railroad Co. v. Mayor of New York*, 1 Hilton, 562 (1858); *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 508 (1876); s. c. 24 Am. Rep. 756; *post*, sec. 379.

By statute in Canada, certain superior courts have power in their discretion to set aside by-laws for illegality, on the application of persons interested, but these courts will not entertain an application to set aside a by-law on a matter of fact, which, according to municipal act, or a by-law passed under it, should be ascertained and finally determined by an officer of the corporation, unless perhaps fraud or corrupt conduct be imputed to such

officer. See *Michie and the Corporation of the City of Toronto, In re*, 11 Upper Can. C. P. 379.

Powers which involve the exercise of judgment or discretion—as whether to commence a suit in the name of a county, &c.,—cannot be delegated to others. *Scolley v. County of Butte*, 67 Cal. 249.

<sup>1</sup> *Baker v. Boston*, 12 Pick. 184; *Hovey v. Mayo*, 43 Me. 322 (1857); *Fay, Petitioner*, 15 Pick. 243 (1834); *Parks v. Boston*, 8 Pick. 218 (1829); *Danielly v. Cabaniss*, 52 Ga. 211 (1874); *Sheridan v. Colvin*, 78 Ill. 237 (1875); *Droz v. Baton Rouge*, 36 La. An. 307; *Alberger v. Baltimore*, 64 Md. 1; *United States v. New Orleans*, 31 Fed. Rep. 537; *Torrent v. Muskegon*, 47 Mich. 115. Where a common council was authorized by the city charter to *construct breakwaters, &c.*, and to defray the cost thereof by special assessments upon the property benefited, and was required to determine the amounts to be charged to each lot, it was held that the action of the council in determining what property would be benefited was conclusive, while its decision of what amounts should be charged to each lot could be reviewed. *Teegarden v. Racine*, 56 Wis. 545.

<sup>2</sup> *Hovey v. Mayo*, street commissioner, 43 Me. 322 (1857); *Benjamin v. Wheeler*, 8 Gray, 409, 413 (1857); *Richmond v. McGirr* (purchase of land for public buildings), 78 Ind. 192 (1881), citing text.



a *market-house*, the courts cannot inquire into the size and fitness of the building for the object intended.<sup>1</sup> So, in the absence of fraud, the court refused to interfere by injunction with the action of the city council in agreeing to rent a room for city purposes for twenty years and to pay for the same in advance.<sup>2</sup> So, also, the *use of the revenue* of a city, above that set apart by law for the payment of interest on its bonded debt and for a sinking fund, is within the discretion of the municipal authorities, and the court will not interfere by *mandamus* to require a part of it to be applied to the payment of a judgment before there is an ascertained surplus over expenditures.<sup>3</sup>

§ 95 (59). **The Subject illustrated.** — So, also, where, by its charter, a municipal corporation is empowered, if it deems the public welfare or convenience requires it, to *open streets or make public improvements thereon*, its determination, whether wise or unwise, cannot be judicially revised or corrected.<sup>4</sup> On the ground that it is the province of the municipal authorities, and not of the judicial tribunals, to determine what improvements shall be made in the streets and highways of the corporation, the court, on application of citizens, *refused to compel a city to cover over an open draining canal* of long standing, it "not appearing to be a nuisance in the legal sense of the word."<sup>5</sup> So where it is made the duty of a city to remove, as far as they may be able, *every nuisance* which may endanger health, the courts, unless the power be transcended, cannot ordinarily interfere to control the manner in which this shall be done.<sup>6</sup> But the power to abate nuisances, like all other *municipal powers*, must be *reasonably exercised*; and although the power be given to be exercised in any manner the corporate authorities may deem expedient, it is not an *unlimited power*, and such means only are intended as are reasonably necessary for the public good; wanton or unnecessary injury to private property and private rights are not thereby

<sup>1</sup> *Spaulding v. Lowell*, 23 Pick. 71, 80 (1839). So where a city has power to lease real estate at a "reasonable rent," the council is to determine what is reasonable, and their discretion in the absence of fraud cannot be judicially revised. *Schanck v. Mayor*, 69 N. Y. 444 (1877).

<sup>2</sup> *Moses v. Risdon*, 46 Iowa, 251 (1877); *quære*, and compare *Garrison v. Chicago*, 7 Bissell, 480 (1877).

<sup>3</sup> *East St. Louis v. Zebley*, 110 U. S. 321. More fully *post*, chap. xiv.

<sup>4</sup> *Methodist P. Church v. Baltimore*, 6

*Gill* (Md.), 391 (1848.) Passing ordinances in relation to opening, &c., of streets, is the exercise of legislative, not judicial power. *Wiggin v. Mayor, &c.* of New York, 9 Paige, 16 (1841). See chapter on Eminent Domain, *post*.

<sup>5</sup> *Inhabitants v. New Orleans*, 14 La. An. 452 (1859).

<sup>6</sup> *Baker v. Boston*, 12 Pick. 184 (1831); see also *Kelly v. Milwaukee*, 18 Wis. 83 (1864); *Goodrich v. Chicago*, 20 Ill. 445. Further as to nuisances, see chapter on Ordinances, *post*. Index — *Nuisances*.

authorized.<sup>1</sup> And generally the judicial tribunals will not interfere with municipal corporations in their internal police and administrative government, unless they are transcending their powers or some clear right has been withheld or wrong perpetrated or threatened.<sup>2</sup>

§ 96 (60). **Public Powers and Trusts incapable of Delegation.**—The principle is a plain one, that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as *it* shall judge best, *cannot be delegated to others*. This principle, its scope and limitations, is best shown by examples of its application to actual cases. Thus, where by charter or statute, local improvements, to be assessed upon the adjacent property owners, are to be constructed in “such manner as the common council shall prescribe” by ordinance, it is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation, the power to determine the mode, manner, or plan of the improvement. Such an ordinance is void, since powers of this kind must, as above shown,<sup>3</sup> be exercised in strict conformity with the charter or incorporating act.<sup>4</sup>

<sup>1</sup> *Babcock v. Buffalo*, 56 N. Y. 268 (1874), where the city was enjoined from filling up plaintiff's slip in the canal, because, under the circumstances, it was not a proper exercise of the power to abate nuisances.

<sup>2</sup> *State v. Swearingen*, 12 Ga. 23; *post*, chap. xxii.

<sup>3</sup> *Supra*, secs. 90, 91.

<sup>4</sup> *State v. Hauser*, 63 Ind. 155; *State v. Bell*, 34 Ohio St. 194; *Birdsall v. Clark*, 73 N. Y. 73; *N. Y. &c. Trustees, In re*, 57 How. Pr. 500; *Thompson v. Schermerhorn*, 6 N. Y. (2 Seld.) 92 (1851), relating to grading and levelling streets; affirming s. c. 9 Barb. 152, and approving in the main the views there expressed by Mr. Justice Cady. *Brooklyn v. Breslin*, 57 N. Y. 591 (1874), distinguishing *Thompson v. Schermerhorn, supra*; *State v. Jersey City*, 1 Dutch. (N. J.) 309; see 4 Dutch. 500; *post*, secs. 357, 716, 780; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396; *Baltimore v. Scharf*, 54 Md. 499, citing this section. Same principle applied in similar case, *Ruggles v. Collier*, 43 Mo. 359 (1869), holding that where the charter gave the city power to require *streets to be paved*, “in all cases where the

*city council* shall deem it necessary,” it could not by ordinance make the mayor the judge of the necessity for paving. Reaffirmed but distinguished, *Shehan v. Gleeson*, 46 Mo. 100 (1870); *East St. Louis v. Wehrung*, 50 Ill. 28 (1869). So, where the charter gives the *city council* power to construct sewers of such “dimensions as may be prescribed by ordinance,” the council cannot by ordinance require sewers to be constructed of such dimensions as may be deemed requisite by the city engineer. *St. Louis v. Clemens*, 43 Mo. 395 (1869), overruling *St. Louis v. Eters*, 36 Mo. 456; reaffirmed, *St. Louis v. Clemens*, 52 Mo. 133 (1873); *Jackson Co. v. Brush*, 77 Ill. 59 (issuing bonds). See further, *State v. New Brunswick*, 1 Vroom (30 N. J. L.), 395 (1863); *Meuser v. Risdon*, 36 Cal. 239; *Hydes v. Joyes*, 4 Bush (Ky.), 464; *Darling v. St. Paul*, 19 Minn. 389, (1872), citing text. When a charter authorized a city *by ordinance* “to erect lamps and to provide for lighting the city,” &c., the delegation of the power so conferred to a committee whose action was to be final, was declared illegal. *Minneapolis Gas Light Co. v. Minneapolis*, 36 Minn. 159. The doctrine of the text ap-

So, where a power, for example, the power to issue licenses, is granted by law, or by an ordinance duly passed, to the mayor and aldermen, they are constituted to act as one deliberative body, to the end that they may assist each other by their united wisdom and experience, and the result of their conference be the ground of their determination: where this is the case, the board of aldermen cannot, even by a vote, delegate the power to the mayor alone.<sup>1</sup> But the

plied where a city, empowered to erect and regulate public wharves, and fix the rates of wharfage thereat, undertook to lease the wharf, farm out its revenues, and delegate a person to fix the rates. *Matthews v. Alexandria*, 68 Mo. 115; *post*, chapter on Taxation. So, where a charter directed the common council to appoint a time when persons interested in an application for opening a street would be heard, the council must itself fix the time, and cannot delegate that duty to the clerk. If it does so, its proceedings will be set aside on *certiorari* or other direct proceeding. *State v. Jersey City*, 1 Dutch. (N. J.) 309 (1855); *State v. Jersey City*, 2 Dutch. 444, 447; *State v. Patterson*, 34 N. J. L. 163 (1870). The text is cited and approved in the following cases: *Birdsall v. Clark*, 73 N. Y. 73; *State v. Trenton*, 42 N. J. L. 74; *Parker v. New Brunswick*, 1 Vroom (30 N. J. L.), 395; *State v. Patterson*, 5 Vroom (34 N. J. L.), 163. A municipal corporation cannot delegate powers conferred upon and to be exercised by it to a street committee or others. *Whyte v. Mayor* (sidewalk assessment), 2 Swan (Tenn.), 364 (1852). See *Smith v. Morse*, 2 Cal. 524; *Oakland v. Carpentier*, 13 Cal. 540; *White v. Nashville*, 2 Swan (Tenn.), 364; compare *State v. Atlantic City*, 5 Vroom (34 N. J. L.), 99, 108. See *Brooklyn v. Breslin*, 57 N. Y. 591 (1874), distinguishing *Thompson v. Schermerhorn*, *supra*. A delegation of power is of course valid when expressly authorized by the legislature. *Brooklyn v. Breslin*, *supra*; *State v. Patterson*, 5 Vroom (34 N. J. L.), 163; *post*, secs. 716, 779.

<sup>1</sup> *Day v. Green*, 4 Cush. 433 (1849), and cases there cited. Further, as to delegation of power, *Coffin v. Nantucket*, 5 Cush. 269 (1850); *Ruggles v. Nantucket*, 11 Cush. 433; *Clark v. Washington*, 12 Wheat. 40, 54 (1827); *Cooley*,

*Const. Lim.* 204; *Railway Co. v. Baltimore*, 21 Md. 93 (1863); *Winants v. Bayonne*, 44 N. J. L. 114; *State v. Patterson*, 34 N. J. L. 163. Power of mayor and aldermen as to choosing site for markets cannot be delegated to commissioners. *Ib.*

A grant by the council of a corporation to build a street railroad must be made by ordinance directly to the parties to be therein named, and the authority to make the grant cannot be delegated by the council to any officer or board. *State v. Bell*, 34 Ohio St. 194. So where the city built a pier in respect of which it was authorized to fix tolls for its use and collect the same. It leased it to a party; failing to keep the pier in repair the lessee brought an action for damages; the power of the council not being subject to delegation the lease was declared void. *Lord v. Oconto*, 47 Wis. 386; *s. p.* *Lauenstein v. Fond du Lac*, 28 Wis. 336; *Mullarky v. Cedar Falls*, 19 Iowa, 21; *Gale v. Kalamazoo*, 23 Mich. 344; *Milhau v. Sharp*, 19 Barb. 435; *Rogers v. Collier*, 43 Mo. 359; *East St. Louis v. Wehrung*, 50 Ill. 28. Any work not done within the time specified, the common council was required to cause to be done by contract or otherwise. An ordinance directed that the superintendent of streets should "cause the work to be done," thus delegating the precise authority conferred upon it. This was held to be unauthorized. The charter conferred the power, said the court, to cause it to be done by contract or otherwise; this required the exercise of discretion and judgment as to the manner in which the work should be done. The legislature said it must be the judgment of the council, and they attempted to invest the superintendent of streets with its exercise. This they had no power to do; they could not delegate the power thus conferred. *Birdsall v. Clark*, 73 N. Y. 73.

principle that the exercise of municipal powers or discretion cannot be delegated *does not prevent a corporation from appointing agents and empowering them to make contracts, or from appointing committees and investing them with duties of a ministerial or administrative character.*<sup>1</sup>

A municipal council having authority to pave streets at the primary expense of the city, directed the making of the pavements of one or the other of specified materials, but giving to the owners of abutting lots, on whom the expense would ultimately fall, the privilege of selecting which, and reserving to the street committee the authority to select, in case the lot-owners failed, and authorized the mayor to execute a contract accordingly, which was done. It was objected by the city that this contract was invalid: (1) because the city could not delegate the power to the mayor to make it; and (2) because the mayor could not delegate to the lot-owners the power of determining the kind of materials. The Supreme Court of the United States, while admitting that "the council could not delegate all the power conferred upon it" in this respect, yet held that it could do its ministerial work by agents, and that there was here no unlawful delegation of power.<sup>2</sup>

§ 97 (61). **Legislative Powers cannot be surrendered or bargained away.** — Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot, as we have just seen, be delegated, so *they cannot without legislative authority, express or implied, be bargained or bartered away.* Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.<sup>3</sup> The cases cited

<sup>1</sup> Railroad Co. v. Marion Co., 36 Mo. 294; Schenley v. Commonwealth, 36 Pa. St. 62; Stewart v. Council Bluffs, 58 Iowa, 642. Where the charter gave the common council power to "ordain by-laws relating to *wharves*, and the anchoring, moving, and mooring of vessels," and "to appoint all necessary officers to carry the by-laws into effect," and the council passed a by-law creating the office of *superintendent of wharves*, and giving him "full power to order and regulate, whenever requested by the owner or lessee of any wharf, the mooring of vessels at such wharf," such a by-law is not void as delegating to the superintendent of wharves

the making of regulations which the charter gave the council alone the power to make. Gregory v. Bridgeport, 41 Conn. 76 (1874). See chapters on Contracts and Corporate Meetings, *post*.

<sup>2</sup> Hitchcock v. Galveston, 96 U. S. 341 (1877). If a contract should be invalid because of the delegation of powers, it may be ratified by the council. *Ib.*

<sup>3</sup> Richmond Gaslight Co. v. Middletown (gas contract), 59 N. Y. 228 (1874); Lord v. Oconto, 47 Wis. 386, approving text; Matthews v. Alexandria, 68 Mo. 115; Bodine v. Trenton (boundaries of streets), 7 Vroom (36 N. J. L.) 198; State v. New Brunswick; 1 Vroom (30 N. J.

mark the scope and illustrate the application of this salutary principle in a great variety of circumstances, and, for the protection of the citizen, it is of the first importance that it shall be maintained by the courts in its full extent and vigor.

§ 98 (62). **Imperative and Discretionary Powers distinguished.**—It is often material to determine *whether a duty*, imposed by law or charter upon municipal corporations or public officers, *is imperative or discretionary*. This is always a question of legislative intention, and, therefore, of construction. The general tests to ascertain this intention, propounded in the cases cited, are of doubtful value. The words that a *corporation or officer* “*may*” act in a certain way, or that it “*shall be lawful*” to act in a certain way, may be imperative. On this subject some of the cases declare the doctrine that what public corporations or officers are empowered to do for others, and

L.), 395; Indianapolis v. Indianapolis Gas Co., 66 Ind. 396, approving text. Milhau v. Sharp, 27 N. Y. 611 (1863); Ill. &c. Co. v. St. Louis, 2 Dillon C. C. Rep. 70; Gale v. Kalamazoo (market-house contract), 23 Mich. 344 (1871); s. c. 9 Am. Rep. 80; Louisville City Railroad Co. v. Louisville, 8 Bush (Ky.), 415 (1871); Covington, &c. R. R. Co. v. Covington, 9 Bush (Ky.), 127; People's Railroad v. Memphis Railroad, 10 Wall. 38, 50 (1869); Presb. Church v. Mayor, &c. of New York, 5 Cow. 538 (1826); followed, Stuyvesant v. Mayor, &c. of New York, 7 Cow. 588; Sav. Fund v. Philadelphia, 31 Pa. St. 175; Lehigh Water Co.'s Appeal, 102 Pa. St. 515; San Francisco Gas Light Co. v. Dunn, 62 Cal. 580; Mayor, &c., of Albany, *In re*, 23 Wend. 277; Railroad Co. v. Mayor, &c., 1 Hilt. 562, 568; Martin v. Mayor, &c., 1 Hill (N. Y.), 545 (1841); Goszler v. Georgetown, 6 Wheat. 593; Sedgw. Const. and St. Law, 634; State v. Graves, 19 Md. 351, 373 (1862); Bryson v. Philadelphia, 47 Pa. St. 329; Cooley, Const. Lim. 206; Albany St., 6 Abb. Pr. R. 273; Britton v. Mayor, &c. of New York, 21 How. Pr. R. 251; New York v. Second Av., &c., Co., 32 N. Y. 261; Dingman v. People, 51 Ill. 277; Brimmer v. Boston, 102 Mass. 19 (1869); Johnson v. Philadelphia, 60 Pa. St. 445; State v. Cin. Gas Co., 18 Ohio St. 262, 295; Jack-

son v. Bowman, 39 Miss. 671 (1861); Oakland v. Carpentier, 13 Cal. 540 (1859), opinion of Baldwin, J.; Smith v. Morse, 2 Cal. 524; Louisville City Railway v. Louisville, 8 Bush (Ky.), 415; Karst v. St. Paul, &c. R. R. Co., 22 Minn. 118 (1875); Peru v. Gleason, 91 Ind. 566; Brenham v. Water Co., 97 Tex. 542; National Bank v. St. Joseph, 31 Fed. Rep. 216; *ante*, sec. 54 and note; *post*, secs. 116, 692, 716. Compare Attorney-General v. Mayor &c. of New York, 3 Duer, 119, 131, 147; Davis v. Same, 14 N. Y. (4 Kern.), 506, 532; Costar v. Brush, 25 Wend. 628; Brooklyn v. City Railroad Co., 47 N. Y. 475 (1872). *One legislature, in the enactment of laws, cannot, by contract, put it out of the power of a subsequent legislature to repeal or amend them*; cannot thus surrender a portion of its sovereign power. Debolt v. Ins. and Trust Co., 1 Ohio St. 564; Plank R. Co. v. Husted, 3 Ohio St. 578, *per Bartley*, C. J., dissenting; Matheny v. Golden, 5 Ohio St. 375; Mott v. Pa. Railroad Co., 30 Pa. St. 9 (1858). But see, in Supreme Court of the United States, Home v. Rouse, 8 Wall. 430, and prior cases cited, and the vigorous dissent (*Ib.* 441), which seems, were the question open, to be the sound view. Cooley, Const. Lim. 127, 280; Sedg. Const. and St. Law, 616, 633; *post*, secs. 385, 692, 716.

that which is beneficial to them or to the public to have done, the law holds they ought to do, especially if the law specifically or adequately supplies them with the means of executing the power. The power in such cases is conferred for the benefit of others or of the public; and the *intent* of the legislature, which is the test in such cases, ordinarily seems, under such circumstances, to be to impose a positive and absolute duty. But, under other circumstances, where the act to be done does not affect third persons, and is not clearly beneficial to them or the public, and the means for its performance are not thus supplied, the words, "may" do an act, or it is "lawful" to do it, do not mean "must," but rather indicate an intent in the legislature to confer a discretionary power.<sup>1</sup> Each case, we repeat, must be largely decided on its own circumstances, and the legislative intent gathered from the whole act. No positive, inflexible, or stereotyped rule can be laid down.

<sup>1</sup> *Mason v. Fearson* (duty of city under tax law), 9 How. (U. S.) 248, 259, *per Woodbury, J.*, and authorities there cited. In *Hurford v. Omaha*, 4 Neb. 336, 350 (1876), the subject is fully examined, and certain tests to ascertain the legislative intention are stated. *Veazie v. China*, 50 Me. 526. It is the settled doctrine in New York, that where a public or municipal corporation or body is invested with power to do an act which the public interests require to be done, and the means for its complete performance are placed at its disposal, not only the execution, but the proper execution of the power, may be insisted on as a duty, though the statute conferring it be only permissive in its terms. *Mayor, &c. of New York v. Furze*, 3 Hill, 612, holding corporation liable for omitting its duty to repair sewers, although it would not have been liable for having omitted to construct them originally. Approved 16 N. Y. 162, *note, per Selden, J.*; *per Denio, J.*, 9 N. Y. 168, 458; *per Allen, J.*, *Ib.* 461. The same doctrine has been declared in New Jersey, *State v. Newark*, 4 Dutch. 491; *Seiple v. Elizabeth*, 3 Dutch. 407; *Reed v. Bainbridge*, 1 Southard, 351, 358. Compare *Reock v. Newark*, 4 Vroom (33 N. J. L.), 129. See, further, the chapter on Actions, *post*, chap. xxiii.

When words are imperative, and when directory, see further, *Grant, Corp.* 34, 35;

*Rex v. Mayor, &c. of Hastings*, 5 Barn. & Ald. 692, *note*; *Attorney-General v. Lock*, 3 Atk. 164; *Rex v. Mayor, &c. of Chester*, 1 Maule & Sel. 101; *Rex v. Bailiffs, &c.*, 1 Barn. & Cress. 86; 3 Barn. & Cress. 272; *Railroad Co. v. Platte Co.* 42 Mo. 171; *Railroad Co. v. Buchanan Co.*, 39 Mo. 485; *Grant v. Erie*, 69 Pa. St. 420; s. c. 8 Am. Rep. 272; *Goodrich v. Chicago*, 20 Ill. 445, authority to city "to remove all obstructions in the harbor," held not imperative. *Ib.* *Ottawa v. People*, 48 Ill. 233; *Carr v. North Liberties*, 35 Pa. St. 324; *Joliet v. Verley*, 35 Ill. 58; *Wilson v. Mayor, &c.*, 1 Denio, 595. An act that "the city council are hereby authorized to elect a recorder, in whom they may vest exclusive jurisdiction of all violations of their ordinances," imposes the duty to elect this officer. The language is mandatory, and not discretionary. *Vason v. Augusta*, 38 Ga. 542 (1868). The expression, in a supplemental charter, "it shall be lawful," construed not to enjoin an imperative duty on the corporation. *Seiple v. Elizabeth*, 3 Dutch. (N. J.) 407; *Steines v. Franklin Co.*, 48 Mo. 167 (1871). *Private action for breach of statutory duty*, when, *Heeny v. Sprague*, 11 R. I. 456; s. c. 23 Am. Rep. 502. Rule in the English courts. *Addison on Torts* (4 Eng. ed.), 1054. See, further, *post*, secs. 468, 832, 836, 857, 908, 934, 949.

§ 99 (63). **Same subject.** — It is also sometimes difficult to determine whether specific duties prescribed by the charter or incorporating act *rest upon the corporation or upon the aldermen or other officers* named in their individual capacity. The question also is one of construction. The general rule is this: that where powers pertaining to the duties of a corporation are conferred upon those who officially represent the corporation, such powers, unless the contrary appears, are deemed to be conferred upon them in their corporate, not their individual character; in other words, upon the corporation itself.<sup>1</sup>

§ 100 (64). **Exemption of Municipal Revenues from Judicial Seizure for Debts.** — Municipal corporations are instituted by the supreme authority of a State for the public good. They exercise, by delegation from the legislature, a portion of the sovereign power. The main object of their creation is to act as administrative agencies for the State, and to provide for the police and local government of certain designated civil divisions of its territory.<sup>2</sup> To this end they are invested with governmental powers and charged with civil, political, and municipal duties. To enable them beneficially to exercise these powers and discharge these duties, they are clothed with the authority to raise revenues, chiefly by taxation, and subordinately by other modes, as by fines and penalties. The revenue of the public corporation is the essential means by which it is enabled to perform its appointed work. Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the ends of its erection thwarted.<sup>3</sup> Based upon considerations of this character, it is the settled doctrine of the law that not only the public property but also the taxes and public revenues of such corporations cannot be seized under execution against them,<sup>4</sup> either in the treasury or when in transit to it. Judgments rendered for taxes, and the pro-

<sup>1</sup> *Conrad v. Ithaca*, 16 N. Y. 158, *per Selden, J.*, p. 170; *Hickok v. Plattsburg*, 15 Barb. S. C. 427; *Glidden v. Unity*, 10 Fost. (30 N. H.) 104, 119; *post*, secs. 208, 236, 237, 974 *et seq.* A power conferred by statute upon *three or more persons* as commissioners, or otherwise, for a public purpose, is not extinguished by the death of one, where no provision exists for filling the vacancy, but vests in the survivors. *People v. Palmer*, 52 N. Y. 83 (1873); *People v. Mayor, &c. of Syracuse*, 63 N. Y. 291, 297 (1875), distinguishing *People v. Nostrand*, where the statute

provided for filling the vacancy in the commission.

Where all are notified to attend, a majority may act. *Post*, secs. 221, note, 233; *Astor v. New York*, 62 N. Y. 567 (1875); *Astor v. New York*, 62 N. Y. 580. Presumption as to notice, *Ib.*; *post*, chap. xxiii.

<sup>2</sup> *Ante*, chap. ii. secs. 9, 28.

<sup>3</sup> Text approved. *Saloy v. New Orleans*, 33 La. An. 79.

<sup>4</sup> *Brown v. Gates, Treasurer, &c.*, 15 W. Va. 131.

ceeds of such judgments in the hands of officers of the law, are not subject to execution unless so declared by statute. The doctrine of the inviolability of the public revenues by the creditor is maintained, although the corporation is in debt, and has no means of payment but the taxes which it is authorized to collect.<sup>1</sup>

§ 101 (65). **Garnishment.** — Upon similar considerations of public policy, *municipal corporations and their officers* have usually, though not uniformly, been considered *not to be subject to garnishment*, although private corporations, equally with natural persons, are liable to this process. The cases on the subject, as respects

<sup>1</sup> *Edgerton v. Municipality*, 1 La. An. 435 (1846), where the subject is ably discussed in the opinion of *Rost, J.* He says: "On the first view of this question there is something very repugnant to the moral sense in the idea that a municipal corporation should contract debts, and that, having no resources but the taxes which are due to it, these should not be subjected by legal process to the satisfaction of its creditors. This consideration, deduced from the principles of moral duty, has only given way to the more enlarged contemplation of the great and paramount interests of public order and the principles of government." *Ib.* 440; *s. p. Municipality v. Hart*, 6 La. An. 570 (1851). This case holds that a judgment in favor of the corporation for a fine incurred for a violation of a municipal ordinance is exempt from execution; but that an *ordinary debt* due the corporation (as on a bond taken for paving) is liable to be seized. But *quære*. In *Edgerton v. Municipality*, *supra*, it was decided that the public taxes and revenues of the corporation could not be seized under execution, notwithstanding the general provision of the Code of Practice of Louisiana, authorizing the seizure, under execution, of "all sums of money which may be due to the debtor in whatsoever right," — this general language being construed to refer alone to *rights of property*, and not to taxes imposed for the protection of those rights. So in *The Railroad Co. v. Municipality*, 7 La. An. 148 (1852), it was held that perpetual ground rents, created and intended by the legislature to form part of the permanent revenue of the city to enable it to exercise its mu-

nicipal powers of police and local government, cannot be sold on execution against the corporation. In *Police Jury v. Michael*, 4 La. An. 84, a seizure of public buildings, &c., by a creditor was enjoined.

The public nature of municipal corporations is well illustrated by the decision of the Supreme Court of the United States, in the case of *The United States v. The Baltimore & Ohio Railroad Co.*, 17 Wall. 322 (1872). The case involved the right of *Congress* to levy a tax upon the income or property of a municipal corporation, and viewing such a corporation as an arm of the State, and partaking of the State's exemption from liability to be taxed upon the means and instrumentalities employed in conducting its operations, it was held that the tax sought to be enforced under the Internal Revenue Act could not be collected. *Post*, sec. 775. The still later and notable case of *Meriwether v. Garrett*, 102 U. S. 472 (1880), noted, *infra*, chap. vii., still more distinctly illustrates the principles of the text. *Post*, sec. 169 *et seq.* See chapter on Taxation, *post*. Property owned by a city as an investment of funds merely, held liable to seizure on execution. *New Orleans v. Insurance Co.*, 23 La. An. 61 (1871). In this case the court declare a distinction between it and *Edgerton v. Municipality*, *supra*, and *Police Jury v. Michael*, 4 La. An. 84; but *quære*. *Underhill v. Calhoun*, 63 Ala. 216, approving the text. *Post*, secs. 576, 850, 861, 884. The *remedy of creditors* of municipal corporations is discussed in the subsequent chapters on Contracts and Mandamus.



municipal corporations, are referred to in the note; and it will be seen, on examination, that some of them turn on the construction of particular statutes, and that the judges differ in opinion respecting the policy and expediency of subjecting, upon general principles, such corporations to the process of garnishment. The author's view, where the question is left entirely open by statute, is, that, on principle, a municipal corporation is exempt from liability of this character with respect to its revenues and the salaries of its officers, but that where it owes an ordinary debt to a third person, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of the remedies which the law gives to creditors of natural persons and of private corporations.<sup>1</sup>

<sup>1</sup> The Supreme Court of *Pennsylvania* is of the opinion that, on principle, a municipal corporation or its officers are not subject to garnishment or attachment or execution, and that by the statutes of that State they are not made liable thereto. *Erie v. Knapp*, 29 Pa. St. 173 (1857); *Bulkley v. Eckert*, 3 Barr (Pa.), 368, *per Sargeant, J.*; *s. p. McDougal v. Supervisors*, 4 Minn. 184; *Bradley v. Richmond*, 6 Vt. 121; *Burnham v. Fond du Lac*, 15 Wis. 193 (1862), where the inconvenience of the opposite doctrine is forcibly pointed out by *Paine, J.*; *Merrell v. Campbell*, 49 Wis. 535; *Drake on Attach.*, sec. 516, 10; *Hadley v. Peabody*, 13 Gray, 200; *Brown v. Gates*, 15 W. Va. 131. Approving text, *Droz v. Baton Rouge*, 36 La. An. 340; *Walker v. Cook*, 129 Mass. 577; *State v. Eberly*, 12 Neb. 616. That the salary of an officer of a municipal corporation cannot be garnished, see *School District, &c. v. Gage*, 39 Mich. 484; *Hebel v. Amazon Ins. Co.*, 33 Mich. 407; *Wallace v. Lawyer*, 54 Ind. 501; *Merwin v. Chicago*, 45 Ill. 133; *Chicago v. Halsey*, 25 Ill. 595; *Thayer v. Tyler*, 5 Allen, 95; *Colby v. Coates*, 6 Cush. 559; *Clark v. Mobile*, 36 Ala. 621 (salary of school teacher); *Hightower v. Staton*, 54 Ga. 108; *McLellan v. Young*, 54 Ga. 399; *s. c.* 21 Am. Rep. 276; *Hadley v. Peabody*, 13 Gray, 200; or be reached by proceedings supplementary to execution. *Roeller v. Ames*, 33 Minn. 132.

In *Missouri*, also, it is held upon general principles that municipal corporations are not subject to garnishment on

account of salary due to their officers. *Hawthorne v. St. Louis*, 11 Mo. 59 (1847); *s. p. Fortune v. St. Louis*, 23 Mo. 239 (1856), where the decision is placed upon the broad ground that such corporations are not liable to be garnished, and not on the ground that an officer's salary is exempt from such process. See also *Neuer v. Fallon*, 18 Mo. 277. Since the first edition of this work the *Supreme Court of Missouri* has modified in an important respect the broad statement of the doctrine held in the former cases. See *Pendleton v. Perkins* and the *City of St. Louis*, 49 Mo. 565 (1872). It was there held, after great consideration, that a city corporation in that State is subject to garnishment, where the main debtor has absconded so that judgment cannot be obtained against him, and he has no property in the State subject to attachment, but has money in the city treasury belonging or due to him; and that it may in such case be reached by bill in equity in the first instance without a previous judgment at law, and without showing fraud or other ground of equitable jurisdiction. It was so decided, notwithstanding the garnishment act in terms exempts municipal corporations from its operation. The opinion of *Bliss, C. J.*, is very full and elaborate.

In *Tennessee*, a municipal corporation is not subject to garnishment at the suit of a creditor of one of its employees; citing *Bank v. Dibrell*, 3 Sneed, 379; *Burnham v. Fond du Lac*, 15 Wis. 193; *Chicago v. Hasley*, 25 Ill. 596; *Baltimore v. Root*, 8

Md. 102; *Hawthorne v. St. Louis*, 11 Mo. 59; *Memphis v. Laski*, 9 Heisk. 511 (1877); s. c. 21 Am. Rep. 327. So in *Georgia*, *McLellan v. Young*, 54 Ga. 399; s. c. 21 Am. Rep. 276. So in *Indiana*, *Wallace v. Lawyer*, 54 Ind. 501; s. c. 23 Am. Rep. 661. In *Kentucky* a city may be garnished in respect of salary due to officers. *Rodman v. Musselman*, 12 Bush, 354 (1876); s. c. 23 Am. Rep. 724.

In *Connecticut*, public officers having money in their hands, to which an individual is entitled, are not subject to garnishment at the suit of the creditors of such individual. *Stillman v. Isham*, 11 Conn. 123 (1835), and cases cited; *Ward v. County of Hartford*, 12 Conn. 404, 408. And in that State a county, not having power to contract a debt for which an action will lie against it, is not subject to garnishment in such a case. *Ward v. County of Hartford*, 12 Conn. 404. But under a statute enabling towns and cities to contract debts, and which provides that debts due from "any person" to a debtor may be attached, these corporations may be factorized or garnished. *Bray v. Wallingford*, 20 Conn. 416 (1850). In *New Jersey* a municipal corporation may be garnished. *Davis v. Graves*, 9 Vroom (38 N. J. L.), 104; see *Jersey City v. Horton*, 9 Vroom (38 N. J. L.) 88.

*Alabama*: In *Underhill v. Calhoun*, 63 Ala. 216 (overruling *Smoot v. Hart*, 33 Ala. 69), it was held that on grounds of public policy a judgment creditor of a municipal corporation cannot reach by garnishment funds accruing to it by taxation whether in course of collection or after being paid into the treasury. *Mayor v. Rowland*, 26 Ala. 498, holds that a municipal corporation cannot be garnished as respects accruing salaries to its officers. See also *Clark v. School Comm'rs*, 36 Ala. 621. But by act of the legislature (1866), process of garnishment lies against a municipal corporation to subject the wages or salary of a policeman to the satisfaction of a judgment obtained against him. *City Council v. Van Dorn*, 41 Ala. 505, overruling *Mobile v. Rowland*, and *Clark v. Mobile S. C.*, 36 Ala. 621. In *Massachusetts* a county is not chargeable as a garnishee for jurors'

fees. *Williams v. Boardman*, 9 Allen, 570. In *Maryland*, notwithstanding a general statute of the State authorized the garnishment of any "person or persons whatever, corporate or sole," it was held that municipalities were not included, and that, upon general grounds of public policy and convenience, the city could not be garnished in respect of money due from the salaries of its officers, although the officer whose salary was attached could have sued the city therefor. *Baltimore v. Root*, 8 Md. 95 (1855). The city, in this case, was garnished in respect of money due from it to a police officer.

But in *New Hampshire*, under a statute making "any corporation possessed of any money" of the debtor subject to garnishment, a town was held to be included. *Whidden v. Drake*, 5 N. H. 13. See *Brown v. Heath*, 45 N. H. 168. In *Iowa* it was held that the words "debtor or person holding property," in the attachment act, extended to municipal corporations, and that they were subject to garnishment with respect to ordinary debts which they owed the main debtor. *Wales v. Muscatine*, 4 Iowa, 302 (1856). The decision of the court asserts the liability to garnishment on general principles; but subsequently the legislature enacted that "a municipal or political corporation should not be garnished." Rev. 1860, sec. 3196. Under the legislation of Iowa, the exemption from garnishment is complete and universal. *Jenks v. Township*, 45 Iowa, 554. Requisites of notice to corporation, *Clafin v. Iowa City*, 12 Iowa, 284; *Williams v. Kenney*, 98 Mass. 142. In *Ohio*, under a statute which provides that "any claims or choses in action, due or to become due" to the judgment debtor, or "money which he may have in the hands of any person, body politic or corporate," are subject to execution, salaries of officers of incorporated cities, due and unpaid, may be subjected by the judgment creditors of such officers to the payment of their judgments, and municipal corporations may be garnished with respect to such salaries. The court admits the conflict in the decisions of other States upon similar statutes, but regards the construction above given as being in accordance with public policy and the meaning of

the statute. *Newark v. Funk*, 15 Ohio St. 462 (1864). In *Illinois*, municipal corporations are not subject to garnishment in any case, no matter what may be the character of the indebtedness. This position is maintained by *Lawrence*, J., with great force. *Merwin v. Chicago*, 45 Ill. 133; *Burns v. Harper* (money in hands of school directors), 59 Ill. 21 (1871); *Millison v. Fisk*, 43 Ill. 112. So in *Iowa*, *Jenks v. Township*, *supra*. Waiver. *Clapp v. Walker*, 25 Iowa, 315. In *Minnesota* a judgment debtor may be ordered to assign to his creditor a debt due him from a municipal corporation. *Knight v. Nash*, 22 Minn. 452 (1876). In *Texas* the view suggested in the text is

adopted, and, in the absence of a statute, a city is subject to garnishment for an ordinary debt due by it to a third person. *City of Laredo v. Nalle*, 65 Tex. 359 (quoting text).

In *Kansas* a city cannot be garnished and made liable to pay a creditor of its creditor without express statutory provision. *Switzer v. Wellington* (Sup. Ct. Kansas, 1889), 28 Am. Law Reg. 281, and note citing and reviewing the cases. *Holt*, C., said: "Cities are a part of the government, and should not be required to become involved in litigation in which they have no interest. This exemption from garnishment process is based entirely upon the ground of public policy."

## CHAPTER VI.

## MUNICIPAL CHARTERS — CONTINUED.

*Special Powers and Special Limitations upon ordinary Municipal Powers.*

§ 102 (66). **Outline of Subject.** — While municipal corporations are everywhere instituted for the same general purposes, heretofore explained,<sup>1</sup> and while there is a striking resemblance in the authority with which they are clothed, yet, except when organized under general acts, the powers given to them in their single and separate charters are various, both in character and extent.<sup>2</sup> True policy, indeed, requires, as before suggested, that the powers of these bodies should, in general, be confined to subjects connected with civil government and local administration; but legislatures are usually liberal in grants of this character, and there is no limit to the faculties and capacities with which municipal creations may be endowed, except as that limit is contained in the State or Federal Constitution.<sup>3</sup> The leading powers ordinarily granted to municipalities, such as those relating to contracts, eminent domain, streets, taxation, ordinances, corporate officers, actions, and the like, will be hereafter separately treated. But it will be convenient to notice in this place certain *special powers* usually or often conferred upon municipalities, and some *special limitations upon ordinary municipal powers*, and the construction which such provisions have judicially received.

We shall here consider the following subjects as they relate to municipal corporations: —

1. Wharves, §§ 103–113.
2. Ferries, §§ 114–116.
3. Borrowing Money, §§ 117–129.
4. Limitations on the Power to create Debts, §§ 130–138.
5. Rewards for Offenders, § 139.
6. Public Buildings, § 140.
7. Police Powers and Regulations, §§ 141, 142.
8. Prevention of Fires, § 143.

<sup>1</sup> *Ante*, chaps. i. ii.; *supra*, secs. 99, 100.

<sup>2</sup> *Ante*, sec. 39, where the general model of an ordinary municipal corporation is given.

<sup>3</sup> *Ante*, secs. 12, 14, 73, and chap. iv. *passim*. *Aurora v. West*, 9 Ind. 74 (1857).

9. Quarantine and Health, §§ 144–146.
10. Indemnifying Officers, §§ 147, 148.
11. Furnishing Entertainments, § 149.
12. Impounding Animals, § 150.
13. Party Walls, § 151.
14. Public Defence, § 152.
15. Aid to Railway Companies, § 153.

§ 103 (67). **Wharves and Wharfage.** — Among the special powers often conferred by the legislature upon municipal corporations bordering upon the high seas or navigable waters is the *authority to erect wharves, and charge wharfage* as a compensation for making and keeping the same and their approaches in a proper and safe condition for the landing, loading, and unloading of vessels.<sup>1</sup> The

<sup>1</sup> *Commonwealth v. Alger*, 7 Cush. 53, 82 (1851); *Pollard's Lessee v. Hagan*, 3 How. (U. S.) 212; *Municipality v. Pease*, 2 La. An. 538 (1847); *Worsley v. Municipality*, 9 Rob. (La.) 324; *New Orleans v. United States*, 10 Pet. 662, 737; *The Wharf Case*, 3 Bland Ch. (Md.) 383; *Ill. &c. Co. v. St. Louis*, 2 Dillon C. C. R. 70 (1872); *Packet Co. v. Keokuk*, 95 U. S. 80 (1877); distinguished, *Baldwin v. Franks*, 120 U. S. 688; *Barney v. Keokuk*, 94 U. S. 324 (1876); *Weber v. Harbor Comm'rs*, 18 Wall. 57 (1873); *Packet Co. v. St. Louis*, 100 U. S. 423 (1879); *Vicksburg v. Tobin*, 100 U. S. 430 (1879); *Railroad Co. v. Ellerman*, 105 U. S. 166 (1881); note to 18 Am. and Eng. Corp. Cas. 511; *Mayor of St. Martinsville v. Steamer Mary Lewis*, 32 La. An. 1293; *The Geneva*, 16 Fed. Rep. 874; *Leathers v. Aiken*, 9 Fed. Rep. 679. Such a power does not violate the Constitution of the United States, *Packet Co. v. Catlettsburg*, 105 U. S. 559. The right of a municipality to collect wharfage is in compensation for actual use of structures provided by the municipality. *Railroad v. Ellerman*, 105 U. S. 166; *New Orleans v. Wilmot*, 31 La. An. 65. An incorporated town cannot charge wharfage for the use of an unimproved river bank in front of it. *Christie v. Malden*, 23 W. Va. 667 (1884). See *infra*, sec. 112, note. For rights and powers of City of New York, in respect to wharves, see *Kingsland v. New York*, 110 N. Y. 569 (1888); *Williams v.*

*New York*, 105 N. Y. 419; *Langdon v. Mayor, &c. of New York*, 93 N. Y. 129, and cases cited; *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90. *Brooklyn v. New York Ferry Co.*, 87 N. Y. 204. *New Orleans v. The Lizzie E.*, 30 Fed. Rep. 876; *Silver v. Tobin*, 28 Fed. Rep. 545; *Railroad Co. v. Ellerman*, 105 U. S. 166; *New Orleans v. Wilmot*, 31 La. An. 65.

*Wharfage charges* must be reasonable (see *infra*, sec. 112), and may be graduated by the tonnage of vessels using a wharf; and this is not a duty of tonnage within the meaning of the Constitution of the United States. *Ouachita Packet Co. v. Aiken*, 121 U. S. 444 (1886); *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Packet Co. v. St. Louis*, 100 U. S. 423; *Packet Co. v. Keokuk*, 95 U. S. 80; *Transportation Co. v. Parkersburg*, 107 U. S. 691 ("wharfage" and "duty of tonnage" defined and distinguished); *N. W. Packet Co. v. St. Louis*, 4 Dillon, 10 (1876); *Keokuk v. Packet Co.*, 45 Iowa, 196 (1876); s. c. affirmed, 95 U. S. 80 (1877); *Ellerman v. McMains*, 30 La. An. 190. See, also, *United States v. Duluth*, 1 Dillon C. C. 469; *Packet Co. v. Atlee*, 2 Dillon, 479 (1873); s. c. 21 Wall. 389. In *McMurray v. Baltimore*, 54 Md. 103, it was held that the "dedication of a street to public use as a street extending to the water carried with it by necessary implication the right of the city to extend it into a harbor by the construction of a wharf at the end

authority of the State over navigable waters and the shores is, of course, *subject to the Constitution of the United States*, and the laws made in pursuance thereof regulating commerce, and to the admiralty jurisdiction of the Federal courts.<sup>1</sup> Although the power to erect wharves and charge wharfage is not strictly one relating to municipalities in their private or local character, it is, nevertheless, competent for the legislature to make them, in such measure as it deems expedient, the repository of it.<sup>2</sup> Such power may be modi-

*thereof.*" To same effect, *Backus v. Detroit*, 49 Mich. 110. *Infra*, sec. 109 and note; sec. 110.

<sup>1</sup> State and authorized municipal *pilot and harbor regulations*, when not in conflict with the Federal Constitution or Federal legislation, are valid. *Steamship Co. v. Joliffe*, 2 Wall. 450; *Cooley v. Board of Wardens*, 12 How. (U. S.) 296; *Pollard's Lessee v. Hagan*, 3 How. 212; *Onachita Packet Co. v. Aiken* (wharfage charges), 121 U. S. 444 (1886); *Cisco v. Roberts*, 36 N. Y. 292; *Port Wardens v. Ship, &c.*, 14 La. An. 289 (1859); *Same v. Pratt*, 10 Rob. (La.) 459; *Chapman v. Miller* (pilotage fee), 2 Speers (S. C.) Law, 769; *Alexander v. Railroad Co.* (duty on *tonnage*), 3 Strob. (S. C.) Law, 594 (1847); *State v. City Council*, 4 Rich. (S. C.) Law, 286; *Commonwealth v. Alger*, 7 Cush. 53, 82 (1850); *Worsley v. Municipality*, above cited; *Jeffersonville v. Ferry Boat*, 35 Ind. 19 (1870); *Harbor-master v. Southerland*, 47 Ala. 511 (1872). But State enactments, which amount to a regulation of commerce or impose a duty on *tonnage*, are of course void. *Cannon v. New Orleans*, 20 Wall. 577 (1874); *Packet Co. v. St. Paul*, 3 Dillon, 454; *Peete v. Morgan*, 19 Wall. 581 (1873); *Steamship Co. v. Port Wardens*, 6 Wall. 31 (1867). The collection of wharfage dues does not violate any provision of the United States Constitution. Where a municipal corporation under express legislative authority is clothed with the exclusive right to collect wharfage rates from all vessels that make use of its wharves, it is a vested right that cannot be impaired by the legislature. *Ellerman v. McMains*, 30 La. An. pt. 1, 190. But this is denied and overruled by the Supreme Court of the United States. *Railroad Co. v. Eller-*

*man*, 105 U. S. 166. A city has no vested right to wharfage. "Whatever powers the municipal body rightfully enjoys over the subject are derived from the legislature, and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration." *Railroad Co. v. Ellerman*, 105 U. S. 166, 172 (1881), *per Matthews, J.*

<sup>2</sup> *Fuller v. Edings*, 11 Rich. (S. C.) Law, 239 (1858); *Waddington v. St. Louis*, 14 Mo. 190 (1851); *Baltimore v. White*, 2 Gill (Md.), 444 (1845); *Wilson v. Inloes*, 11 Gill & J. (Md.) 351; *Weber v. Harbor Commrs*, 18 Wall. 57 (1873); *Railroad Co. v. Ellerman*, 105 U. S. 166 (1881); *Town of Ravenswood v. Flemings*, 22 W. Va. 52, where an act conferring upon a town the *exclusive right* to erect wharves within its limits between ordinary high-water mark and low-water mark without compensation to the adjacent lot-owners, was held constitutional, and an adjacent owner enjoined from constructing a wharf within those limits without the consent of the town. The owner of a private wharf, whose land is compulsorily taken for a public wharf, is not necessarily entitled to be compensated for *loss of income* from his private wharf, resulting from the establishment of the public wharf near to the private one. *Fuller v. Edings, supra*. The grant of an *exclusive right to keep a wharf*, in order to secure its erection, does not violate the provision of a State Constitution, declaring "that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services." Such an improvement is beneficial to the public, and, in order to secure it, the exclusive profits for a given period may be granted to the contractor. *Martin v. O'Brien*, 34

fied or revoked by the legislature at its pleasure if it does not deprive the municipality of property actually acquired under the exercise of the power.<sup>1</sup> It may authorize a municipal corporation to establish *a public wharf upon private property* on making compensation to the owner of the land; and the power, when conferred upon the

Miss. (5 George) 21, (1857); see, also, *Geiger v. Filor*, 8 Flor. 325 (1859). Effect of 14th Amendment to the Federal Constitution on the power of the legislature to grant *exclusive privileges*. See *Slaughter House Cases*, 16 Wall. 36 (1872).

<sup>1</sup> *Railroad Co. v. Ellerman*, 105 U. S. 166 (1881). This case adjudged two important points. The city of New Orleans was empowered by the legislature to construct levees and wharves on the banks of the Mississippi River within its limits, and to charge reasonable compensation for their use. Under this authority the city, at its expense, graded the banks of the river at certain points, drove piles, covered them with plank flooring, and thus constructed wharves for the convenient landing of vessels. The legislature also authorized the defendant railroad company, whose terminus was in New Orleans, to construct, manage, use, and enjoy, not only its railroad property and appurtenances, but also any steamboat piers and wharves that the directors might deem necessary or convenient. And afterwards, by an act passed in 1869, the legislature authorized this railroad company to enclose a portion of the banks of the river (at a place never improved or used by the city as a wharf), and to use the place thus enclosed for the purposes of a wharf for vessels; and the act further provided that no vessel should use such wharf without the consent of the railroad company, and that all vessels so using such wharf and not using any other wharf in the city *should be exempt from the payment of levee and wharf dues to the city*. The railroad company afterward leased its wharf to others, which lease provided that vessels coming to the consignment, custody, or care of the lessees might load and unload their cargoes on the said wharf, *exempt from wharf and levee dues to the city*. The city made two points: *First*,

that inasmuch as under its franchise to construct wharves it had expended large sums in making wharves for the public convenience, it had a *vested right* to the franchise and its revenues, of which it could not be deprived, as the legislature had sought to do, by the act of 1869. *Second*, it was also contended that it was a violation of the city's rights for the railroad company to permit the use and employment of their property as a wharf by persons not engaged in conducting the proper business of the railroad company, thus opening a rival wharf business in competition with the city; and that the act of 1869, if it authorizes this to be done, is in violation of the Constitution of the United States, which forbids the taking of private property without due process of law. See *ante*, sec. 68, note.

The Supreme Court decided that the action could not be maintained; that the act of 1869 did not infringe any vested rights of the city, and that the question as to whether the company in constructing its wharf and in leasing it out, as above stated, acted *ultra vires*, could not be raised by the city, which was not a stockholder in the defendant company.

The decision below (2 Woods, 120), following the decision of the Supreme Court of Louisiana in *New Orleans v. The Railroad Co.* (27 La. An. 414), based on the proposition that the act of 1869 did not confer upon the railroad company the right to charge wharfage dues against vessels landing at the said wharf which were in no way connected with the business of the railroad company, and the right to maintain a free wharf for such vessels, was reversed. On this point the Supreme Court was of opinion that the city was not entitled to raise the question that the company was violating its charter in this respect, and under that cover to create and protect a monopoly which the law did not give to it.

municipality, cannot be arrested by an offer on the part of the land-owner himself to erect a wharf.<sup>1</sup>

§ 104 (68). **Public and Private.**—Wharves, piers, quays, and landing places may be either *public* or *private*. They may be, in their nature, public, although the property be owned by an individual. If *private*, the public have no right to use the erection without the owner's consent, express or implied;<sup>2</sup> if *public*, they may be used by persons generally upon the payment of a reasonable compensation. Whether they are public or private depends, in case of dispute, upon circumstances, such as the purpose for which they were built, the uses to which they have been applied, the place where situated, and the character of the structure.<sup>3</sup>

§ 105 (69). **Duties and Rights of Owner.**—The keeping of a wharf or dock, erected and opened to the public, like the keeping of an inn, confers a *general license* to boats and vessels to occupy it for lawful purposes,—a license which can be terminated only by notice

<sup>1</sup> Waddington v. St. Louis, above cited; Iron Railroad Co. v. Ironton, 19 Ohio St. 299 (1869); Page v. Baltimore, 34 Md. 558 (1871); State v. Jersey City, 34 N. J. L. 390. Municipalities may under legislative grant build *wharves and levees on streets* bordering on the Mississippi River, and make or authorize the making of other improvements thereon; such as a *steamboat depot building*, for the storage of freight and the convenience of travellers. Barney v. Keokuk, 94 U. S. 324 (1876); s. c. below, 4 Dillon, 593; Ill. &c. Co. v. St. Louis, 2 Dillon, 70. Although its charter and the statutes give a city power to maintain wharves and collect wharfage, the legislature may lawfully grant to a railroad company a *portion of the water front* for its own wharf purposes, free from the control of the city. Railroad Company v. Ellerman, 105 U. S. 166.

<sup>2</sup> A town incorporated under the code of West Virginia has no power to assess and collect wharfage from the owner of a private wharf who uses it as the landing of a ferry of which he is the proprietor. Christie v. Malden, 23 W. Va. 667.

<sup>3</sup> Dutton v. Strong, 1 Black (U. S.), 23 (1861). The owner of a *private* pier may, it was held in this case, cut loose a

vessel attached to it without a license if the pier be thereby endangered, no matter how great the stress of the weather or the peril to which the vessel may be thereby subjected. That compensation is received for the use of a public wharf does not deprive it of its public character. Galveston Wharf Co. v. Galveston, 63 Tex. 14.

*Wharf: What constitutes.* Upon a *non-tidal stream*, any construction of timber or stone upon the bank, of such shape that a vessel may lie alongside of it, with its broadside to the shore, constitutes a wharf; and a *paved street extending to the water's edge*, and used by vessels as a place for receiving and discharging freight and passengers, may be so designated. Keokuk v. Keokuk, &c. Packet Co., 45 Iowa, 196 (1876).

Expenditures in providing wharves is the basis of the municipality's right to collect wharfage. Railroad Co. v. Ellerman, 105 U. S. 166 (1881). A *paved street extending a sufficient depth into the water*, and used by the citizens generally for all purposes of a street and by vessels for a landing place, is a sufficient wharf to justify a city in charging wharfage on a non-tidal stream like the Mississippi River. Keokuk v. Keokuk &c. Packet Co., 45 Iowa, 196, 206 (1876).



and request to remove the vessel.<sup>1</sup> When thus established, the owner at common law is, as respects the public, bound to *keep it in good repair*.<sup>2</sup> In view of these obligations on the part of the owner of the wharf, the common law gave him *the right to distrain* for his wharfage or toll.<sup>3</sup>

§ 106 (70). **Right of Riparian Owner.**—By the common law, the *riparian owner has the right to establish a wharf on his own soil*, this being a lawful use of the land.<sup>4</sup> The right is *judicially recognized in this country*, and riparian proprietors on ocean, lake, or navigable river have, in virtue of their proprietorship, and without special legislative authority, the right to erect wharves, quays, piers, and landing places on the shore, if these conform to the regulations of the State for the protection of the public, and do not become a nuisance by obstructing the paramount right of navigation. This right has been exercised by the owners of the adjacent land from the first settlement of the country. The right terminates at the point of navigability, unless special authority be conferred, because at this point the necessity for such erections ordinarily ceases. Such

<sup>1</sup> Heeney v. Heeney, 2 Denio, 625; Nicoll v. Gardner, 13 Wend. 289 (1835); Lansing v. Smith, 4 Wend. 9; Dutton v. Strong, 1 Black, 23, distinguished from Heeney v. Heeney, *supra*; Chicago Dock Co. v. Garrity, 115 Ill. 155.

<sup>2</sup> A municipality owning a wharf is bound to exercise the same care as is required of an individual owner, for the convenience and safety of boats, &c., using it. Willey v. Allegheny, 118 Pa. St. 490. See, also, Watson v. Turnbull, 32 La. An. 856; *infra*, sec. 114.

<sup>3</sup> Hale de Port. Maris, 77; Bradley on Distress, 133; Nicoll v. Gardner, 13 Wend. 289. The *right of distress* is regulated by statute in the city of New York, and it was there held, that where wharfage accrued in the seventh ward, the owner of the wharf might distrain therefor in the eleventh ward. 13 Wend. 289. See Lansing v. Smith, 4 Wend. 9, 21. Wharfage is *not properly a tax*, like that levied to support government, but rather compensation paid by owners of vessels for accommodation for their boats and merchandise. Swartz v. Flatboats, 14 La. An. 243 (1859); s. p. Keokuk v.

Keokuk Packet Co., 45 Iowa, 196 (1876). If a city is entitled to the wharfage from public wharves, and the owner of a lot adjacent to such wharf receives wharfage, he is liable to the city therefor. Baltimore v. White (assumpsit), 2 Gill (Md.), 444. The right, as between private persons and a city corporation, to the money collected for wharfage, may be tried in an action for money had and received. Murphy v. City Council, 11 Ala. 586 (1847). See Grant v. Davenport, 18 Iowa, 179.

<sup>4</sup> Nicoll v. Gardner, 13 Wend. 289, (1835), *per Nelson, J.*; Lansing v. Smith, 4 Wend. 9, affirming s. c. 8 Cow. 146. See observations of Finch, J., in Mayor v. Hart, 95 N. Y. 443, 457 (1884), as to nature of riparian rights and privileges. Heeney v. Heeney, 2 Denio, 625; Myers v. St. Louis, 82 Mo. 367; s. c. below, 3 Mo. App. 266; Union Depot Co. v. Brunswick, 31 Minn. 297; R. R. Co. v. Schurmeir, 7 Wall. 272; Yates v. Milwaukee, 10 Wall. 497; Weber v. Harbor Comm'rs, 18 Wall. 57; Potomac Steamboat Co. v. Upper Potomac &c. Co., 109 U. S. 672; Hoboken v. Penn. R. R. Co., 124 U. S. 656. *Infra*, sec. 107, and note.

structures are presumptively lawful where they are confined to the shore, and no positive law is violated in their erection.<sup>1</sup>

<sup>1</sup> Heeney v. Heeney, 2 Denio, 625; Thornton v. Grant, 10 R. I. 477 (1873); s. c. 14 Am. Rep. 701; Sherlock v. Bainbridge, 41 Ind. 35 (1872); s. c. 13 Am. Rep. 302; Wisconsin, &c. Co. v. Lyons, 30 Wis. 61; Dutton v. Strong (action of trespass by owner of vessel against owner of private pier for cutting the vessel loose), 1 Black (U. S.), 23 (1861), distinguished from Heeney v. Heeney, above cited. Same principle reaffirmed, Railroad Co. v. Schurmeir, 7 Wall. 272; Yates v. Milwaukee, 10 Wall. 497; approved, Weber v. Harbor Comm'rs, 18 Wall. 57 (1873); Illinois v. Illinois Central R. R. Co. (Chicago lake front case), 33 Fed. Rep. 730; State v. Jersey City, 1 Dutch. (N. J.) 525, 530; Wetmore v. Brooklyn Gas Co., 42 N. Y. 384; Galveston v. Menard, 23 Tex. 349; Grant v. Davenport, 18 Iowa, 179, *per* Wright, J. But in *California*, see Dana v. Jackson, &c. Co., 31 Cal. 118. As to right to erect wharf by other than riparian owner on a tidal river, below high-water mark, *quære*; see Hagan v. Campbell, 8 Port. (Ala.) 9. In this case it is said: "It is clear that no part of such erections can be rested upon the lands of the riparian proprietor, nor can he be excluded from the use of the water, or denied other riparian rights." See People v. Davidson, 30 Cal. 379; Walker v. State Harbor Comm'rs, 17 Wall. 648 (1873); Packet Co. v. Atlee, 2 Dillon, 479 (1873); s. c. 21 Wall. 389. The plaintiff owned in fee, subject to the public easement of travel thereon, land to the centre of a street extending to the water line of the East River, on which he had constructed a bulkhead and wharf, and had the right to collect wharfage; the city of Brooklyn, without plaintiff's consent and wrongfully, built a pier at the end of the street, which pier was attached to the plaintiff's soil and between his land and the water line, and shut off the water from the plaintiff's wharf; and afterwards the city collected wharfage from all persons using the same. It was held that the pier in front of the plaintiff's half of the street became the property of the plaintiff by accretion, and that

the plaintiff could compel the city to account by way of damages for all of the wharfage received by the city, *without allowance for any expense of collecting the same*,—which latter seems to be a very rigid rule, as it apparently goes beyond the line of compensation. Steers v. Brooklyn, 101 N. Y. 51 (1885).

*Riparian rights* such as wharfage, do not necessarily attach to grants of land by the State under tide water below the shore line, or low-water mark. In such case the right to wharfage depends upon the terms of the grant, or its intent as shown by its declared purpose or by fair inference from its terms and the surrounding circumstances, such as long continued prior use, &c. Weber v. Harbor Comm'rs, 18 Wall. 57 (1873); Potomac Steamboat Co. v. Upper Potomac Co., 109 U. S. 672. The principles of these cases were applied in Turner v. People's Ferry Co. (U. S. Cir. Court, N. Y.), 21 Fed. Rep. 90 (1884), where, under the circumstances, it was held that the owner or lessee of premises along the bulkhead line at the head of a slip, between two wharves owned by the city of New York, was not entitled to an injunction to restrain the erection of a ferry rack and structures under authority of the State and the city in the slip in front of his premises, which structures when erected, although they would impair, would not cut the complainant off from free and open access to his premises. The legislation of New York applicable to the question and the cases bearing upon it are clearly presented in the opinion of Brown, J. See great case of Langdon v. Mayor, &c. of New York, 93 N. Y. 129 (1883), and observations of Earl, J. pp. 144, 145, as to construction of water grants by the State and by the city. Hoboken v. Penn. R. R. Co., 124 U. S. 656, discusses the power of the legislature in respect of making grants of land under the navigable waters of the State. Gould v. Hudson River R. R. Co., 6 N. Y. 522; Langdon v. Mayor, &c. of New York, 93 N. Y. 130, 144; Mayor &c. v. Hart, 95 N. Y. 443 (1884); Lehigh Valley R. R. Co. v. Trone, 28 Pa. St. 206; Tomlin v. R. R. Co.,

§ 107 (71). **Limitations on Riparian Right.** — The *rights of riparian proprietors* in respect to the erection of wharves, are subject to such *reasonable limitations and restraints* as the legislature may think it necessary and expedient to impose. Therefore it is competent for the legislature to pass acts *establishing harbor and dock lines*, and to take away the right of the proprietors to build wharves on their own land beyond the lines, even when such wharves would be no actual injury to navigation.<sup>1</sup> But the right of wharfage held by

32 Iowa, 106; *Ingraham v. R. R. Co.*, 34 Iowa, 249.

<sup>1</sup> *Commonwealth v. Alger*, 7 Cush. 53 (1851). This subject is here very fully and learnedly discussed and examined. See also, *Hart v. Mayor*, 9 Wend. 571, valuable case, affirming 3 Paige, 213; *Wetmore v. Brooklyn Gas Co.*, 42 N. Y. 384; *People v. Vanderbilt*, 26 N. Y. 287; *Same v. Same*, 28 N. Y. 396; *Pollard's Lessee v. Hagan*, 3 How. (U. S.) 212; *Hagan v. Campbell*, 8 Port. (Ala.) 9; *Mobile v. Eslava*, 9 Port. (Ala.) 577, (1839); *Railroad Co. v. Winthrop*, 5 La. An. 36. In *Yates v. Milwaukee*, 10 Wall. 497, Mr. Justice Miller, on behalf of the court, speaking of an existing wharf, denied that the city of Milwaukee, *under the power to establish dock and wharf lines*, could create an artificial and imaginary dock line, hundreds of feet away from the navigable part of the river, and, without making the river navigable up to that line, deprive the riparian owners of the right to avail themselves of the advantages of the navigable channel by building wharves and docks to it for that purpose; and said that if the city deemed the removal of the wharf in question necessary in the prosecution of any general scheme of widening the channel or improving the navigation of the river, it must first make the owner compensation for his property thus taken for the public use. As to this case, see *infra*, sec. 111. *Nature and extent of riparian rights fully considered in Lyon v. Fishmongers' Co.*, L. R. 1 App. Cas. 662 (1876); *Barney v. Keokuk*, 94 U. S. 324 (1876). The riparian proprietor upon a navigable lake, subject to the rights of the public, has the right to build piers and wharf in aid of navigation in front of his land, not interfering with the public easement; which rights appertain

to his title, and are of such a nature that the legislature cannot authorize a railway company to build in front thereof so as to cut off access to the water, without such company being liable for damages to the riparian proprietor. *Delaplaine v. C. & N. W. Ry. Co.*, 42 Wis. 214 (1887). The judgment is largely founded on and approves the opinions in *Lyon v. Fishmongers' Co.*, L. R. 1 App. Cas. 662. As to power of the legislature in respect of making grants of lands under navigable waters, see *Hoboken v. Penn. R. R. Co.*, 124 U. S. 556, distinguishing *Hoboken Land and Improvement Co. v. Hoboken*, 36 N. J. Law, 540, and other cases in New Jersey. See *Yates v. Milwaukee*, 10 Wall. 497; *Weber v. Harbor Comm'rs*, 18 Wall. 57; *Railway Co. v. Renwick*, 102 U. S. 180. The leading case in New York as to construction and effect of grants of land *under water* is *Langdon v. Mayor, &c. of New York*, 93 N. Y. 129.

Referring to the conflicting cases as to the nature and extent of the rights of the riparian proprietor, *Cooley, J.*, said: "In *Railway Co. v. Renwick*, 102 U. S. 180, the better and more substantial doctrine is laid down, that the land under the water in front of a riparian proprietor, though beyond the line of private ownership, cannot be taken and appropriated to a public use by a railway company under its right of eminent domain without making compensation to the riparian proprietor." *Backus v. Detroit*, 49 Mich. 110, 114 (1882). *Contra*, *Langdon v. Mayor of New York*, 93 N. Y. 129, and New York cases there cited. See interesting opinion of *Finch, J.*, in *Mayor v. Hart*, 95 N. Y. 443, 457 (1884).

In the *Chicago Lake Front Case*, 33 Fed. Rep. 730, U. S. Cir. Court, *Harlan* and *Blodgett, JJ.* (*Illinois v. Illinois Cent.*

a grantee under a valid city grant, although it is an incorporeal right, is nevertheless property, or a property right, which can only be taken away by the legislature by the exercise of the right of eminent domain, on making compensation to the owner of the wharfage right.<sup>1</sup>

§ 108 (72). **Right to erect Public Wharves.** — While the riparian proprietor has the right to erect wharves which are private in their nature, but which may be used by the public with the consent of the owner, express or implied, the *right to erect public wharves and to demand tolls or fixed rates of wharfage* is, according to the better view, a franchise, which must have its origin in a legislative grant.<sup>2</sup>

§ 109 (73). **By Municipality.** — If a *municipality* is itself a *riparian proprietor*, this will probably give to it, in the absence of any

R. R. Co.), it was held that the defendant railroad company, as the riparian owner of certain water lots in Chicago, had the right, by virtue of such ownership, to connect the shore-line by artificial construction with outside waters that were navigable in fact, in the absence of legislative or governmental direction to the contrary; although the court added, that the exercise of that right is at all times subject to such regulations—at least, those not amounting to prohibition—as the State may establish; citing text, secs. 70-77; *Yates v. Milwaukee*, 10 Wall. 397, and other cases. It was also declared in the same case that the State of Illinois had the power, by legislation, to fix pier, dock, or wharf lines, other than those erected under authority of the United States, to which riparian owners in waters navigable in point of fact must conform.

*Municipal control, under legislative grant, over right of riparian owner to wharf out.* *Baltimore v. White*, 2 Gill (Md.), 444 (1845); *Wilson v. Inloes*, 11 Gill & J. (Md.) 351; *Barney v. Keokuk*, 94 U. S. 324 (1876); s. c. 4 Dillon, 593; *Weber v. Harbor Comm'rs*, 18 Wall. 57 (1873). Where, under acts of the legislature, a city had the power to refuse assent to riparian owners to erect wharves, or to allow it upon such terms as they deemed beneficial to navigation and the use of the port of that city, it was held that the city might make the grant of the right to erect

a wharf upon the condition that its exterior margin should constitute a *public wharf*. *Baltimore v. White*, *supra*.

<sup>1</sup> *Langdon v. Mayor, &c.* 93 N. Y. 129; *Williams v. Mayor, &c.* 105 N. Y. 419. For measure of compensation to the wharf proprietor in such case, see *Kingsland v. Mayor, &c.* 110 N. Y. 569.

<sup>2</sup> *People v. Wharf Co.*, 31 Cal. 34; *The Wharf Case*, 3 Bland Ch. (Md.) 383; *Wiswall v. Hall*, 3 Paige Ch. 313; *Houck on Rivers*, sec. 282; *Thompson v. Mayor*, 11 N. Y. 115. Text approved: *Christie v. Malden*, 23 W. Va. 667; *The Geneva*, 16 Fed. Rep. 874. See, as to navigator's right to moor and land, *Bainbridge v. Sherlock*, 29 Ind. 364; modified, *Sherlock v. Bainbridge*, 41 Ind. 35 (1872); *Talbot v. Grace*, 30 Ind. 389; *Jeffersonville v. Ferry Co.*, 27 Ind. 100; s. c. 35 Ind. 19 (1870); *Railroad Co. v. Ellerman*, 105 U. S. 166; *New Orleans v. Wilmot*, 31 La. An. 65. Right of city as to grant to it of land under water, and the construction of such grant. *Langdon v. Mayor, &c.* of New York, 93 N. Y. 129; *Weber v. Harbor Comm'rs*, 18 Wall. 57; *Hoboken v. Pa. R. R. Co.*, 124 U. S. 656, distinguishing *Hoboken Land Imp. Co. v. Hoboken*, 36 N. J. L. 540; *supra*, sec. 107, note. State courts have jurisdiction of suits for wharfage against domestic vessels. *Jeffersonville v. Ferry Co.*, 35 Ind. 19, 23; *The Phebe*, 1 Ware Rep. 360; *Russell v. The Swift*, Newb. R. 553; *Lewis, In re*, 2 Gallis. 483.

restrictive provision in its organic act, the implied authority to erect a wharf thereon, and it would have the incidental right, the same as a private owner, to charge compensation for its use.<sup>1</sup> Its rights

<sup>1</sup> *Murphy v. City Council*, 11 Ala. 586 (1847). The court say: "The title to the wharf is in the city, and, such being the fact, it had the same right as any other proprietor to collect wharfage from those landing goods there. This right, resulting from its proprietary interest, is not a franchise, but a right of property." *Ib.*, per Ormond, J., p. 558. The city of Boston has, under the laws of Massachusetts, the same rights as other littoral proprietors, and was held not to dedicate a dock, which it owned, to the public, by merely abstaining from any control over it. The court observe: "The people of Boston, who owned the land as their common and private property, acted through a corporation (the city), whose corporate grants and licenses are matters of record. Their own use of their own property for their own benefit cannot be called a dedication of it to any other public of wider extent. Whether it was called 'town dock' or 'public dock' which were used as synonymous terms, it would furnish no ground to presume that they had parted with their right to govern and use it in the manner most beneficial to the people or public of the town or city." *Boston v. Lecraw*, 17 How. (U. S.) 426 (1854). The title and right involved in the *Lecraw* case, just cited, were before the Supreme Court of the United States three times (17 How. 426; 19 How. 263; 24 How. 188). The plaintiff was the owner of two wharves, called the Price Wharf and the Bull Wharf, which extended from high to low water mark. The City of Boston (the defendant) laid out Summer Street thirty feet in width to the water, and the lines of the street if extended into the water would separate the plaintiff's two wharves. The land under the waters within such extended space between high and low water mark belonged to the city. The action was brought by the wharf owner or his tenant against the city for nuisance, charging that the city had erected piles in the said water space, or dock, between the plaintiff's two wharves; also a drain in the dock for carrying off sewage. In the case in 17 How.

426, the Supreme Court decided that the City of Boston, as the proprietor of the land under water at the foot of Summer Street, might reclaim the land under water by filling up the space and building thereon, and thus exclude the public, including the plaintiff, from its use for navigation when covered by the tide; but that until the owner (the city) did so the public might lawfully use the same; and that such use is not adverse to the city or the owner of the land, and lays no foundation for a claim of dedication of the land to that use, since the right of navigation is the paramount right, but was a right defeasible by the exercise of the city's right to reclaim its land under water by wharfing out or making erections thereon beneficial to itself; and the court held that there was no evidence whatever that the city or the people of Boston had dedicated the slip or dock between the plaintiff's wharves to any public use, and that the city had the right to drive piles or extend its sewers in the *locus in quo* to low-water mark. In the case in 19 How. 263, the court decided that if the city had determined to reclaim this dock or land under water between the plaintiff's wharves, and had laid out and constructed a street thereon or continued the street to low-water mark, then the right to use it as a street or highway *on land* became appurtenant to the wharf property of the adjoining owners; and also that if the city in the exercise of its power to make drains under the streets should so construct them as to hinder the public in their use of the streets as streets, or to create a nuisance to the adjoining properties, it would be liable therefor, since if such a street be made the plaintiff would have a right to pass along the same as well as the public. In the case in 24 How. 188, it appeared that the space had not been reclaimed from the water, and that no street on land had been made; and the court decided that though the city was the owner of the land at the foot of the street between high and low water mark, it could not lay out a street or highway *in the water* of the ocean for

would be the same as those of any similar proprietor, and no greater, unless enlarged by legislative grant.

§ 110 (74). **Powers of Municipality.**—Except as mentioned in the last section, all of the *powers of a municipality* in respect to wharves and docks must, like all its other powers, be derived from the legislature.<sup>1</sup> Where *streets terminating or fronting on navigable*

boats and vessels; and that on the facts of the case the city was not liable to the plaintiff, the owner of the wharves, for erecting drains and sewers on the city's own land at the foot of the street, for the preservation of the health of the city. *Commonwealth v. Roxbury*, 9 Gray, 514, 519, and note; *Railroad Co. v. Ellerman*, 105 U. S. 166. *Bona fide* purchaser of a wharf in the city of Baltimore, erected under contract with the city, and in which the city had certain rights, held affected with notice of those rights. *Baltimore v. White*, 2 Gill (Md.), 444. A city, authorized by its charter to build wharves on its own property, and to obtain by contract or purchase the title or the control of other wharves in the city, and to raise a revenue therefrom by establishing and collecting a rate of dockage and wharfage, had no power to take a lease of a wharf containing a provision that it should be kept as a *free wharf*. *Mobile v. Mood*, 53 Ala. 561. *Wharves, whether terminating streets or not, are not streets*; if owned by the city they may be leased to private persons. In such case the title is not a public easement, but proprietary. *Horn v. People*, 26 Mich. 221; and see *Scott v. Layng*, 59 Mich. 43; *supra*, sec. 103, note; *infra*, sec. 110, note; sec. 114, note, as to ferry landing at foot of street. "Within the corporate limits, the city of New Orleans, under her charter and under the general law, has the right to control, manage, and administer the use of the river banks for the public convenience and utility; to establish wharves and landings; to erect works and provide facilities for the use of vessels and water craft; and to charge just compensation for the use thereof. Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the use thereof, which is public.

The discretion of the city authorities in determining what are proper and needed facilities for commerce, and on what part of the river bank, within her limits, they should be established, is manifestly not a proper subject for judicial control or interference. Whatever incidental damage may result to proprietors from the exercise of these unquestionable corporate rights, it is *damnum absque injuria*." *Per Fenner, J.*, in *Watson v. Turnbull*, 34 La. An. 856.

<sup>1</sup> *Snyder v. Rockport*, 6 Ind. (Porter) 237 (1855); *Railroad Co. v. Winthrop*, 5 La. An. 36; *State v. Jersey City*, 34 N. J. L. 31; *Mayor of St. Martinsville v. Steamer Mary Lewis*, 32 La. An. 1293. As the municipality derives such powers from the legislature, the legislature may repeal or revoke them at pleasure, if it does not deprive the municipality of property acquired by it under the legislative grant. *Railroad Co. v. Ellerman*, 105 U. S. 166 (1881). Under the charter of a city providing that the city "*shall have control of the landings of the Mississippi River, and the right to build wharves and regulate the landing, wharfage, and docking of boats*," it may establish and construct wharves, and collect a reasonable compensation for their use. *Muscatine v. Keokuk, &c. Packet Co.*, 45 Iowa, 185 (1876); *post*, sec. 112. While a city may be enjoined, at the instance of a taxpayer, from raising taxes or appropriating money for the unauthorized construction of a wharf, it will not be restrained from exercising a clear power to grade streets, merely because, by such grading, a wharf at the river end of the street will incidentally result. *Snyder v. Rockport*, above cited. The city of Dubuque, under its charter, was held to have power to prohibit all persons, including riparian owners, from using any place but the public wharf

*waters* have been established, whether by condemnation or dedication, and whether the fee is in the municipality or in the adjoining proprietor, the municipality, under legislative authority to establish and regulate wharves, may cause public wharves to be constructed at the ends or in front of such streets and receive the wharfage from the same; and this is no invasion of the rights of the owner of private property abutting on such streets, or of the rights of the adjoining riparian proprietor.<sup>1</sup> In regard to *private wharves* lawfully

without paying wharfage. *Dubuque v. Stout*, 32 Iowa, 80; s. c. 7 Am. Rep. 171; *post*, sec. 112, note. As to the use, under municipal authority, of streets bordering on a navigable river for structures for the accommodation of passengers and the storage of freights, &c., see *Barney v. Keokuk*, 94 U. S. 324 (1876); s. c. below, 4 Dillon, 593; Ill. &c. Co. v. St. Louis, 2 Dillon, 70.

<sup>1</sup> *McMurray v. Mayor, &c. of Baltimore*, 54 Md. 104 (1880); *Dugan v. Mayor*, 5 Gill & Johns. 375; *Haight v. Keokuk*, 4 Iowa, 199; *Barney v. Keokuk*, 94 U. S. 324; *Rowans' Ex'rs v. Portland*, 8 B. Monroe, 253; *Newport v. Taylor's Ex'rs*, 16 B. Monroe, 700; *Barney v. Mayor*, 1 Hughes (C. C.) 118; *Potomac Steamboat Co. v. Upper Potomac, &c. Co.*, 109 U. S. 672 (1883), and cases cited by *Matthews, J.*, on pp. 682, 683. The general ground of the doctrine is that streets terminating or fronting on the water may be legitimately used for wharf purposes; and the cases show that there is a very general legislative recognition of this right and usage. In accordance therewith, it was held in the Chicago Lake Front case by the United States Circuit Court (*Harlan and Blodgett, J.J.*), 33 Fed. Rep. 730 (1888), that the city of Chicago, as the riparian owner of ground on the shore of the lake, having, also, under its charter, power to maintain wharves and slips at the ends of streets, and to maintain a breakwater to protect the shore, could delegate the power to construct such breakwater to a railroad company as consideration for allowing the road to enter the city; and that upon the erection of the breakwater and the filling in of the space between the breakwater and the shore line, the land thus reclaimed belonged to the city, — *Blodgett, J.*, dissent-

ing on this point. It was decided in *City of Baltimore v. White*, 2 Gill (Md.), 444 (1845), that under an act of the legislature prohibiting any person from making or extending any wharf in Baltimore, without the city's consent to the plan thereof first obtained, the city may refuse its assent to the erection of a wharf except upon the condition that its exterior margin shall constitute a public wharf. If private persons accept or act upon the city's assent thus conditioned, and thereupon build the wharves, they consent to the dedication of its exterior margin for that purpose; and in the absence of a contract or legislative provision as to who is entitled to the wharfage at such a wharf, it was held under the circumstances to belong to the city, and not to the riparian proprietor who constructed the same. In *Newport, &c. v. Taylor's Ex'rs*, 16 B. Monroe, 699, 804 (1855), it was decided that where a proprietor of lands laid out a town on a navigable river and dedicated the land along it to be a *common*, that such dedication conferred upon the public authorities of the town the right to build wharves. s. f. as to lands dedicated as a street on the river bank of a town. *Rowan's Executors v. Portland*, 8 B. Mon. 232, cited with approval by *Matthews, J.*, in *Potomac Steamboat Co. v. Upper Potomac &c. Co.*, 109 U. S. 686, 687; *Louisville v. Bank*, 3 B. Mon. 144; *Kennedy v. Covington*, 8 Dana, 61. A city in *Alabama* constructed a wharf at the end of a dedicated street leading to the water; held that the adjoining proprietor was not the owner of the wharf, and could not eject the city therefrom. *Doe v. Jones*, 11 Ala. 63 (1847). In *Michigan*, a dedicated street terminating upon a navigable water gives to the city, having power to erect and regulate public wharves and docks at the

erected, the municipal authorities have only such powers of local regulation and government as their charters or constituent acts, in general or special terms, confer upon them.<sup>1</sup> *Their own right* to erect wharves may be express or implied. The power, even when conferred in terms, is, like other powers, to be *construed somewhat strictly when it affects private rights*, but not so strictly as to defeat

ends of streets, the right, as against a proprietor whose property fronts on the street and the navigable water, to erect a wharf for public purposes, and this irrespective of whether the city holds the fee of the street or not. *Backus v. City of Detroit*, 49 Mich. 110 (1882). In this case *Cooley, J.*, said: "The dedication passed [by the statute] the fee in all streets marked upon it to the county in which the city was situated. But this was only in trust for street purposes. We attach no special importance to the fact that the title passed instead of a mere easement. The purpose of the statute is not to give the county the usual rights of a proprietor, but to preclude questions which might arise respecting the public uses, other than those of mere passage, to which the land might be devoted." *The city of Detroit* is, by its charter, authorized "to erect, repair, and regulate 'public wharves' and docks at the ends of streets, and on the property of the corporation, and to fix lines beyond which private docks shall not extend, and to lease wharf and wharfage privileges at the ends of streets," &c. This gives the power to the city to authorize a wharf to be built at the end of a street terminating on the navigable water. It was held in *Horn v. People*, 26 Mich. 222, that wharves constructed by the city under this power, whether at the end of highways or on its property, are the property of the city, and may be leased as such. *Campbell, J.*, thus defines the words "public wharf," as used in the charter (*Ib.* p. 224): "There is no instance in which the term 'public wharf' has been used in our legislation to indicate anything analogous to a dedication to any public use, like that of highways. Such a public right is unknown to the common law. Wharfage involves exclusive use, for longer or shorter periods, by each vessel, depending on the nature of its busi-

ness, and the extent of its cargo. All that is meant in the charter by a 'public wharf' is a wharf belonging to the city, and to be used like any other wharf property. The term is applied as well to wharves on city property away from streets, as to wharves at the end of streets." See also, *Scott v. Layng*, 59 Mich. 43, 49 (1886). See *post*, chap. on Dedication.

<sup>1</sup> *Grant v. Davenport*, 18 Iowa, 179 (1865). Where the charter of a city authorizes it "to regulate the erection and repair of private wharves and the rates of wharfage thereat, the city," says *Wright, C. J.*, "may regulate, but not destroy; may exercise control, as over other private property within its limits, but not to the extent of appropriating the use and enjoyment thereof to the public without compensation." *Ib.* *Liability of city corporation for an injury to a private wharf*, caused by diverting streams of water to a point near the wharf, thereby causing a great deposit of sand and earth, which lessened the depth of water at the wharf and impaired its value. *Barron v. Baltimore*, 2 Am. Jurist, 203, cited and approved in *Stetson v. Faxon*, 19 Pick. 147 (1858); and see, also, *Thayer v. Boston*, 19 Pick. 510. If the deposits from sewers constructed by the city cause a peculiar injury to the wharf owner, the city is liable to the latter in damages. *Franklin Wharf Co. v. Portland*, 67 Me. 46 (1877); s. c. 24 Am. Rep. 1, and Mr. Thompson's note; *Haskell v. New Bedford*, 108 Mass. 208; *Brayton v. Fall River*, 113 Mass. 218; s. c. 18 Am. Rep. 470; *post*, chap. xxiii. Power to erect public wharves and to condemn private property therefor includes the power to extend a wharf already established, and compulsorily to appropriate the necessary land for that purpose, on making compensation to the owner. *Hannibal v. Winchell*, 54 Mo. 172 (1873).



the purpose of the grant.<sup>1</sup> Thus, although the corporate boundaries may by the charter be extended to low-water mark, and the corporation has express power "to regulate the erection and occupation of *all* wharves or levees within the corporate limits," this does not give the corporation, as against the riparian proprietor (whose right was construed to extend to low-water mark), the power to control the river bank so as to require such proprietor or his lessee to take out a license for his wharf-boat, fastened to the shore of his own land, and used for business purposes.<sup>2</sup>

§ 111 (75). **Scope of Municipal Power.**—So where a riparian proprietor had constructed a wharf which extended to, but did not encroach upon the navigable part of the river, and which was not shown to be a nuisance in fact, it was held by the Supreme Court of the United States that the city within which the wharf was situated could not, under the *charter power to establish dock and wharf lines and restrain and prevent encroachments upon the river and obstructions thereto*, pass an ordinance declaring the wharf to be an obstruction to navigation, and a nuisance, and ordering it to be summarily abated.<sup>3</sup>

<sup>1</sup> As to the extent of municipal power over public and private wharves and the respective rights of the riparian owner and municipal authorities, concerning wharves and wharfage: *Railroad Co. v. Ellerman*, 105 U. S. 166 (1881); *Grant v. Davenport*, 18 Iowa, 179 (1865); *Cincinnati v. Walls*, 1 Ohio St. 222; *Muscataine v. Hershey*, 18 Iowa, 89; *Galveston v. Menard*, 23 Tex. 348; *Baltimore v. White*, 2 Gill (Md.), 444 (1845); *Furman v. New York*, 5 Sandf. S. C. 16; affirmed, 10 N. Y. 567; *Dugan v. Baltimore*, 5 Gill & Johns. (Md.) 357 (1833); reversing s. c. 3 Bland, Ch. 361; *Wilson v. Inloes*, 11 Gill & Johns. (Md.) 358; *Shepherd v. Municipality*, 6 Rob. (La.) 349; *Columbus v. Grey*, 2 Bush (Ky.), 476; *Kennedy v. Covington*, 17 B. Mon. 567; *Memphis, &c. Packet Co. v. Grey*, 9 Bush (Ky.), 137 (1872); *Comm'rs v. Neil*, 3 Yeates (Pa.), 54; *Richardson v. Boston*, 24 How. (U. S.) 188; s. c. 19 How. 263; 17 How. 426; *Newport v. Taylor*, 16 B. Mon. 699 (1855); *Commonwealth v. Roxbury*, 9 Gray, 514, 519, and note by Mr. (now Justice) Gray; *Trowbridge v. Mayor* (right of Albany under Dongan charter), 7

Hill (N. Y.). 429; s. c. 5 Hill, 71; *Hart v. Mayor*, 9 Wend. 571; *Lansing v. Smith*, 4 Wend. 4; *Thompson v. Mayor*, 11 N. Y. 115; *Marshall v. Guion*, 1b. 461; *Corporation v. Scott*, 1 Caines, 543; *Mayor, &c. v. Hart*, 95 N. Y. 443 (1884); *Langdon v. Mayor, &c.* N. Y. 93 N. Y. 129, and cases cited; *Potomac S. B. Co. v. Upper Potomac, &c. Co.*, 109 U. S. 672 (1883). Principles of construction, *ante*, sec. 89, and notes; *post*, 113, note.

The charter powers of a municipality in respect to wharfage are subject to the unlimited control of the legislature, except so far as the rights of creditors may be impaired. *St. Louis v. Shields*, 52 Mo. 361 (1873); *Railroad Co. v. Ellerman*, 105 U. S. 166 (1881); *ante*, sec. 69.

<sup>2</sup> *McLaughlin v. Stevens*, 18 Ohio, 94, (1849); *Blanchard v. Porter* (extent of riparian right), 11 Ohio, 138, 144; *Muscataine v. Hershey*, 18 Iowa, 39; *Martin v. Evansville*, 32 Ind. 85 (1869).

<sup>3</sup> *Yates v. Milwaukee*, 10 Wall. 497 (1870). *Yates v. Milwaukee* was approved and applied in the Chicago Lake Front case by *Harlan and Blodgett, JJ.*, in *State of Illinois v. Illinois Central R.*

§ 112 (76). **Tolls and Wharfage.** — If the right to impose wharfage is given to a municipality, but not limited, the question of the *amount* which the municipal authorities may exact is confided to their discretion, and is one with which the courts cannot interfere,<sup>1</sup> unless, perhaps, in a case where the by-law imposing it is plainly unreasonable.<sup>2</sup> But the amount of tolls or wharfage may, of course, be regulated by the legislature.<sup>3</sup>

§ 113 (77). **Duties and Liability of Municipality.** — The interests of commerce imperatively require that *public wharves should be in a*

R. Co., 33 Fed. Rep. 730 (1888). Approved and distinguished, *Weber v. Harbor Comm'rs* (San Francisco), 18 Wall. 57 (1873). See *supra*, sec. 107, note.

<sup>1</sup> *Municipality v. Pease*, 2 La. An. 538 (1847); *Muscatine v. Hershey*, 18 Iowa, 39, 42 (1864), *per Wright, J.*; *Coal Float v. Jeffersonville*, 112 Ind. 15 (1887). The erection of a wharf by a city was presumed to be for the benefit of the public, and in the *absence of an ordinance* fixing the wharfage dues or providing for the payment of a compensation for the use of its wharves, it was held that such compensation could not be collected by the city. *Muscatine v. Keokuk, &c. Packet Co.*, 45 Iowa, 185 (1876). A city may *prescribe by ordinance the fees* which shall be paid for the use of the wharves within its limits, and this power is impliedly subject only to the limitation that such fees shall be reasonable. *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa, 196 (1876). As to right of a city to charge wharfage fees when vessels or boats are moored at places where *no* wharves have been founded. *Id.*; *Dubuque v. Stout*, 32 Iowa, 80; s. c. 7 Am. Rep. 171.

*Voluntary Payment.* Where the owners of boats have paid wharfage fees under protest, which were demanded and collected in the absence of authority to make the demand, they cannot recover them back in an action against the city. *Muscatine v. Keokuk, &c. Packet Co.*, 45 Iowa, 185 (1876). The mere danger that an action at law will be commenced to enforce payment does not make the payment of a demand unjustly and illegally made a compulsory payment. *Id.* See cases on the subject of voluntary and compulsory payment, cited at large, *post*,

chap. xxiii. *Packet Co. v. St. Louis*, 4 Dillon, 10 (1876); *ante*, secs. 94, 95.

<sup>2</sup> See *ante*, sec. 94 and note, as to when and how far discretionary powers are subject to judicial cognizance. As to reasonableness of wharfage charges: *supra*, sec. 103 note. *Coal Float v. Jeffersonville*, 112 Ind. 15 (1887). As to general requirement of law that all ordinances or by-laws must be reasonable, see *infra*, chap. xii. *Municipal Ordinances and By-Laws*.

<sup>3</sup> *Baltimore v. White*, 2 Gill (Md.), 444 (1845); *Murphy v. City Council*, 11 Ala. 586 (1847); *Munn v. Illinois*, 94 U. S. 113. Authority to a city "to erect, repair, and regulate wharves and the rates of wharfage," authorizes it to collect wharfage upon goods landed on the bank, the space in front of the city being dedicated to the public, although no artificial wharf was erected. *Sacramento v. Steamer*, 4 Cal. 41. This subject is discussed by *Wright, J.*, in *Muscatine v. Hershey*, 18 Iowa, 39, but the point is not decided by the court. See *Dubuque v. Stout*, 32 Iowa, 47, 80 (1871); s. c. 7 Am. Rep. 171. In *Kentucky*, however, it is held that the owner of the land must build wharves, or improve the shore, or make some preparation for the reception or delivery of goods, or accommodation of vessels, before he is entitled to collect tolls or wharfage. *Columbus v. Grey*, 2 Bush (Ky.), 476. See *supra*, sec. 103, note. If he permits the municipal authorities so to improve the wharves, he will only be entitled to reasonable compensation for the use of the river bank. *Id.* The word "quay" defined by *McLean, J.*, in *New Orleans v. United States*, 10 Pet. 661, 715.

*safe condition*; and if a municipal corporation is in possession of such a wharf and exercises control over it, and receives tolls for its use, it owes a duty to the public to keep it in proper and secure condition for use, and it is liable, without statutory enactment to that effect, to an action for any special injuries to boats and vessels caused by its failure to discharge this duty. In such a case it is not material whether the city had adopted ordinances for the regulation of the wharf, or, having such, neglected to enforce them, as in either event the responsibility is the same.<sup>1</sup>

§ 114 (78). **Ferries; Nature of Ferry Grant to a Municipality.** —

It is not unusual for the legislature to make to a municipal corporation a more or less extensive grant respecting *ferries and ferry franchises*. Such a grant is not, unless otherwise expressed, a compact which cannot be impaired, but in the nature of a public law, subject to be repealed or changed, as the public interests may demand.<sup>2</sup> If the legislature has conferred, as in some of the ancient

<sup>1</sup> *Pittsburgh v. Grier*, 22 Pa. St. 54 (1853). "This case," says *Perley*, C. J., in *Eastman v. Meredith*, 36 N. H. 284, 295, "is put distinctly upon the ground that the public duty, which was the foundation of the action, arose out of the control which the city exercised over the wharf, and the income received for the use of it." That the right to collect wharfage by the city imposes the duty to keep in repair, and a correlative liability, has been often determined. City not liable for filling up slip from a sewer. *Reed v. Lynn*, 126 Mass. 367; *Shinkle v. Covington*, 1 Bush (Ky.), 617, where there was a failure to provide proper fastenings for boats. *Allegheny v. Campbell*, 107 Pa. St. 530; *Willey v. Allegheny*, 118 Pa. St. 490; *supra*, sec. 105, and note. *People v. Albany*, 11 Wend. 539, 543; *Buckbee v. Brown*, 21 Wend. 110; *Mersey Dock Trustees v. Gibbs*, Law R. 1 H. L. 93. *Lessee of city* is under like liability. *Radway v. Briggs*, 37 N. Y. 256 (1867). In form, the action in such a case against the city may be either *case* or *assumpsit*. *Pittsburgh v. Grier*, 22 Pa. St. 54 (1853). But it is no defence to an action by a city for wharfage that the wharf was not well built and needed further improvement or repairs. *Prescott v. Duquesne*, 48 Pa. St. 118; *Jeffersonville v. Ferry Co.*, 27 Ind. 100; s. c. 35 Ind. 19

(1870); *Winpenny v. Philadelphia*, 65 Pa. St. 135 (1870). Where it was rendered unsafe by acts of others, notice, express or implied, is an element necessary to liability, the same as in the case of defective highways. *Seaman v. New York*, 3 Daly (N. Y.), 147; *post*, chap. xxiii., where the subject and the ground of the liability of the corporation for torts is considered at large.

The duty of those having control of a harbor is, so long as it is open to the public, to have it *reasonably safe for the public use, and this whether tolls are collected or not for the use of it*. *Parnaby v. Lancashire Canal Co.*, 11 A. & E. 223; *Metcalfe v. Hetherington*, 11 Ex. 257; s. c. 5 H. & N. 719; *Gibbs v. Liverpool Docks*, 3 H. & N. 164; s. c. L. R. 1 H. L. C. 93, 104, 122; *Longmore v. Great Western Railway Co.*, 35 L. J. C. P. 135; *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Webb v. Port Bruce Harbor Co.*, 19 Upper Can. Q. B. 626; *Coe v. Wise*, L. R. 1 Q. B. 711; *Winch v. Conservators of the Thames*, L. R. 7 C. P. 471; see *Sweeney v. Port Burwell Harbor Co.*, 17 Upper Can. C. P. 574; reversed, 19 Upper Can. C. P. 376; *Berryman v. Port Burwell Harbor Co.*, 24 Upper Can. Q. B. 34.

<sup>2</sup> *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 511 (1850); *Roper v. McWhorter*, 77 Va. 214; *ante*, sec.

charters in England and in this country, upon a municipal corporation *its whole power* to establish and regulate ferries within the corporate limits, the corporation thus representing the sovereign power may make an *exclusive* grant.<sup>1</sup> But such a corporation has not an *exclusive* power over the subject, unless, by express words or necessary inference, it be plainly given to it by the legislature. Hence, power to a municipality *to establish and regulate ferries* within its limits *does not give it an exclusive power*, and consequently does not authorize it to confer an exclusive privilege upon others to establish a ferry.<sup>2</sup>

68. As to extinguishment of ferry franchise by a subsequent legislative grant to build a bridge at the site of the ferry, and take tolls, see the famous case of *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420 (1837). The dissenting opinion of Mr. Justice *Story*, on the important constitutional question involved in this case, is referred to by Mr. *Webster*, in a letter to Judge *Story*, as "the ablest and best written opinion I ever heard you deliver; it is close, searching, and scrutinizing; the opposite opinion has not a foot nor an inch of ground to stand on." 2 *Story*, Life and Letters, 268. Chancellor *Kent* expressed the same opinion. *Ib.* 270. But fifty years' subsequent experience has vindicated the judgment of the court and placed it upon an immovable and unquestioned foundation. *Construction of special grant.* *Hartford Bridge Co. v. Ferry Co.*, 29 Conn. 210, where a ferry had been maintained by a city for a time beyond the memory of living men, it was held, in the absence of other evidence, that its franchise was established by prescription; and also, that while the State could divest the city of the franchise, its purpose and intent to do so must clearly appear, and cannot be left to implication. *City of Laredo v. Martin*, 52 Tex. 548 (1880). As to corporations by prescription, see *ante*, secs. 32, 37.

<sup>1</sup> *Costar v. Brush*, 25 Wend. 628 (1841). See also *Mayor, &c. of New York v. Starin*, 106 N. Y. 1; *Mayor, &c. of New York v. New York & N. J. S. N. Co.*, 106 N. Y. 28.

<sup>2</sup> *Minturn v. Larue*, 23 How. (U. S.) 435 (1859); *Harrison v. State*, 9 Mo. 526 (1845); *McEwen v. Taylor*, 4 G.

*Greene* (Iowa), 532; *ante* secs. 89-91, and cases in notes. While the exclusive power conferred by the legislature upon a city to grant a ferry license does not authorize it to grant an *exclusive* license, yet the power to grant an exclusive license is conferred when the city is authorized "to grant or refuse a license." *B. & H. Ferry Co. v. Davis*, 48 Iowa, 133 (1878). The power to refuse gives the power to limit the issue of licenses; if it can limit, there is no reason why it cannot bind itself to issue no other; but the power to license, or to license and regulate certain occupations, does not, it seems, include the power to create a monopoly. *Chicago v. Rumph*, 45 Ill. 90; *Logan v. Pyne*, 48 Iowa, 524; *B. & H. Ferry Co. v. Davis*, 48 Iowa, 133. But "the grant of exclusive ferry licenses rests upon peculiar grounds. It is in some sense an extension of a public road. The objection to the creation of a monopoly is overcome in the matter of a few by the consideration of the public necessity or advantage." *Ib.*, per *Adams, J.* The question whether the grant of a ferry to individuals by the legislature deprives a municipal corporation possessing the usual powers to provide for the convenience and prosperity of its citizens, of the right to establish a competing ferry, discussed but not decided, in *Gibbes v. Beaufort*, 20 S. C. 213. A city owning a ferry must administer the public trust thus imposed as the public interest may require. *Waterbury v. Laredo*, 68 Tex. 565 (a contract by which a city gave to an attorney one third of the rents of a ferry, and bound itself not to make any engagement which would interfere with its terms, held void as being against pub-

§ 115 (79). **License Fee and Tax; Construction of Special Grant.** — By its charter a city was empowered “to license, continue, and regulate” as many ferries within its limits, to the opposite shore of a river bounding it, as the public good required, and the common council were further authorized “to direct the manner of issuing and registering the licenses, and to prescribe the sum of money to be paid therefor into the treasury of the corporation.” Under this, an ordinance prohibiting all persons from ferrying, without a license from the mayor, and authorizing this officer to grant licenses to any person upon payment into the treasury of the city of the sum of fifty dollars, was sustained against the objections that there was no power to *prohibit* ferrying without a license, and that the license fee was a *tax*. The words of the charter, “To prescribe the sum of money to be paid into the treasury of the corporation,” were regarded by the court as showing a clear intent to make licenses a source of revenue to the city; and the court added that the amount charged as a license fee did not appear to be unreasonable.<sup>1</sup>

§ 116 (80). **Power to Lease, Covenant, etc.** — If a municipal corporation, seized of a ferry, *lease the same*, through the agency of the mayor and aldermen, *with a covenant for quiet enjoyment*, this covenant will not restrain the mayor and aldermen from exercising the powers vested in them by statute, to license another ferry over the same waters, if in their judgment (which cannot be reviewed by the courts) the public necessity and convenience require it. On such a covenant the city may be liable to the covenantees; but the powers vested in the *city officers as trustees for the public cannot be thus abrogated*. If, however, the city in its corporate capacity is the legal owner of an *exclusive franchise*, its grantees or lessees would hold it, notwithstanding any license to others, whether granted by the mayor and aldermen or any other tribunal.<sup>2</sup>

lic policy). Whether the *dedication of land for a highway or street terminating on a river* will authorize the use of the same for a *ferry landing*, that is, for fastening boats and receiving and discharging freights and passengers, without the consent of the abutting owner, see *Prosser v. Wappello County*, 18 Iowa, 327, and cases cited; also 4 Am. Law Reg. (N. S.) 519 (1865); *supra*, sec. 103, note; sec. 109, note.

<sup>1</sup> *Chilvers v. People*, 11 Mich. 43 (1862). As to distinction between a license fee and a tax, see *Ash v. People*, 11 Mich. 347; *Flanagan v. Plainfield*, 44 N.

J. L. 118, and the chapters on Ordinances and Taxation. *Post*, secs. 357, 768. Amount of license city may exact, the State law on the subject being held to affect the city. *Reddick v. Amelia*, 1 Mo. 5 (1821).

<sup>2</sup> *Fay, In re*, 15 Pick. (Mass.) 243 (1834). The court will not try on *certiorari* the conflicting titles of parties to a ferry franchise. *Id.*; *ante*, chap. v. sec. 97.

*Rights of municipal corporations in connection with ferries, and extent of legislative control*. See *Fanning v. Gregoire et al.*, 16 How. (U. S.) 524 (1853); *East Hartford v. Hartford Bridge Co.*, 10 How.

§ 117 (81). **Borrowing Money ; concerning Implied Power to borrow Money.** — We shall hereafter treat of the *implied power* of municipal corporations *to issue negotiable securities*. But this is a different question from *the power to borrow money*. The power to borrow may be given in express language, in which case the terms and purpose of the grant will, of course, measure its extent. But suppose the power is not expressly conferred, *does it exist by implication?* It is perhaps settled law in this country that private corporations, organized for pecuniary profit, have, in the absence of special limitation or restriction, an implied or incidental authority to borrow money for their legitimate purposes, and to give negotiable obligations for its repayment.<sup>1</sup> The question of the *incidental authority of municipal corporations to borrow money* has not been so thoroughly considered and so often decided as to be entirely closed to controversy. In view of the legislative practice to confer, in terms, all powers so important as this, the dangerous nature of this power, by reason of the temptation it holds out to incur needless debts and to make extravagant expenditures, and the facilities it

511; affirming *s. c.* 16 Conn. 149; 17 Conn. 80, 96; *Chilvers v. People*, 11 Mich. 43; *O'Neill v. Police Jury*, 21 La. An. 586; *Aikin v. Railroad Co.*, 20 N. Y. 370 (1859), relating to the ferry rights of the city of Albany; *Benson v. Mayor, &c.* of New York, 10 Barb. 223; *Harris v. Nesbit*, 24 Ala. 398; *United States v. Fanning, Morris* (Iowa), 348; *Conner v. New Albany*, 1 Blackf. (Ind.) 43; *City v. Ferry Co.*, 27 Ind. 100; *Shallcross v. Jeffersonville*, 26 Ind. 193. The right of a city, given by charter, *to license and tax ferries*, is not, unless so expressed, exclusive of a like right in the State or county. *Harrison v. State*, 9 Mo. 526 (1845). "Power to *regulate ferries*," given to municipal corporations in general incorporation act, construed. *Duckwall v. New Albany*, 25 Ind. 233. When equity will annul lease. *Phillips v. Bloomington*, 1 G. Greene (Iowa), 498. A power conferred upon a city to establish ferries and to fix the rates, fees, and rents, authorizes it to *rent* the ferry, but it *cannot surrender its control and supervision* wholly to another. *Macdonell v. International & G. N. Ry. Co.*, 60 Tex. 590. See *supra*, secs. 96, 97. In Virginia it was held that a county and a city, being joint grantees of ferry franchises, had no power to lease

the ferries to private persons, the franchise being a public trust which they could not, without legislative sanction, dispose of or delegate. *Roper v. McWhorter*, 77 Va. 214. Upon *division of an old town* owning ferry franchise, the *new town* owns no interest therein except so far as conferred by the legislature. *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *post*, chaps. vii., viii.

<sup>1</sup> *Stratton v. Allen*, 16 N. J. Eq. 229; see *ante*, sec. 50, and chapter on Contracts, *post*, sec. 488. *Lucas v. Pitney*, 3 Dutch. (N. J.) 221; *Hackettstown v. Swackhamer*, 8 Vroom (37 N. J. L.), 191; construction of specific grant, *Mayor, &c. v. Bailey*, 8 Vroom (37 N. J. L.), 519. But see observations of *Byles, J.*, in *Bateman v. Mid-Wales Railway Co.*, L. R. 1 C. P. 510 (1866), as to powers of common-law corporations in England in respect to drawing, accepting, or indorsing negotiable securities. The court in this case deny (in the absence of express legislative authority conferring the power) that it is competent to a company incorporated in the usual way for the formation and working of a railway to draw, accept, or indorse bills of exchange. *Infra*, sec. 125.

offers for frauds, and the settled and salutary doctrine that such corporations have no powers but such as are expressly conferred, and those which are necessary to effect the objects of the corporation, and those which are incidental to the express grants,<sup>1</sup> the author, where the legislative will is wholly silent, is strongly inclined to *deny the existence of a general implied or incidental power* to borrow money. But it must be admitted that down to the present time a majority of the express adjudications on the subject favor the contrary opinion.<sup>2</sup>

§ 118 (82). **The Subject considered in Ohio and elsewhere.** — The question arose *in Ohio*, in 1836, and was fully argued and considered. The town of Chillicothe possessed authority to purchase real estate, erect public buildings, repair streets, and the usual municipal powers. The right to borrow money was *not expressly* granted, and the only question in the case (an action upon the bonds of the town given for borrowed money) was, whether it was granted by implication. The case was regarded as of the first impression, no authorities in point being produced. The court *distinctly decided* that in carrying out the express powers, or in effecting any legitimate municipal object, the corporation possessed the *incidental* or *implied* right to borrow money.<sup>3</sup> Subsequently the Supreme Court of Wisconsin affirmed the implied authority of a municipal corporation, as incidental to the execution of the general powers granted by its charter, and in the absence of a special restriction, to borrow money and issue its bonds therefor, it appearing that the proceeds thereof went into the treasury of the city and were expended by it.<sup>4</sup> “The charter,” says the court, stating its reasons, “does confer the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things, for the execution of which money would be necessary as a means. It would seem, therefore, that in the absence of any restriction, the power to borrow money would

<sup>1</sup> *Ante*, secs. 90, 91.

<sup>2</sup> Text cited *Robertson v. Breedlove*, 61 Tex. 316; *Richmond v. McGirr*, 78 Ind. 192.

<sup>3</sup> *Bank v. Chillicothe*, 7 Ohio, Part II. p. 31 (1836).

<sup>4</sup> *Mills v. Gleason*, 11 Wis. 470 (1860); s. c. 8 Am. Law Reg. 692; *State v. Madison*, 7 Wis. 688; *Clark v. Janesville*, 10 Wis. 136; *Clarke v. School District*, 3 R. I. 199 (1855), in which it is held that when money is borrowed to pay a lawful debt of a corporation, and it is so applied, the corporation is liable on the

notes given for the money borrowed; it is not held that notes so given under the incidental power to provide for the payment of debts have all the qualities of commercial paper. In *State, ex rel. v. Babcock*, 22 Neb. 614 (1888), it was held that a power to make regulations to secure the general health of a city and to construct sewers and to regulate their use, conferred necessarily the power to provide money for the construction of a sewer for the purpose of draining its principal street, by issuing bonds therefor. See *infra*, secs. 120, 125, 126.

pass as an incident to these general powers, according to the well-settled rule that corporations may resort to the usual and convenient means of executing the powers granted; for certainly no means is more usual for the execution of such objects than that of borrowing money." In this case, as in the other, the question was not raised until the money had been borrowed and the rights of third persons had attached.<sup>1</sup>

<sup>1</sup> *City v. Lamson*, 9 Wall. 477, 486 (1869), where the Wisconsin cases are referred to by *Nelson, J.*; *ante*, sec. 50, and notes. The right of private corporations generally to borrow money, as incidental to the express powers granted, is extensively considered upon principle and authority, in the important case of *Curtis v. Leavitt*, 15 N. Y. 9 (1857). See, also, *Barry v. Merch. Ex. Co.*, 1 Sandf. Ch. 280; *Beers v. Phoenix Glass Co.*, 14 Barb. 358; *Stratton v. Allen*, 16 N. J. Eq. 229; *Lucas v. Pitney* (power of railroad company), 3 Dutch. (N. J.) 221; *Fay v. Noble* (manufacturing corporation), 12 Cush. 1; *Davis v. Prop. &c. of Meeting-house* (religious corporation), 8 Met. 321. Perhaps it is difficult to draw a distinction between private and municipal corporations in respect to the incidental right to borrow money. But we see much more reason for affirming the existence of an incidental power of this kind with respect to trading, banking, manufacturing, and railroad corporations, than in relation to municipal corporations. There is a difference between contracting a debt in the prosecution of an ordinary legitimate corporate purpose and borrowing money for that purpose. In the one case, the application of the credit is necessarily secured to the advancement of the authorized object, while money borrowed is liable to be lost or to be diverted to illegitimate purposes. This difference is insisted on with great force by *Agnew, C. J.*, in the dissenting opinion in *Williamsport v. Commonwealth*, 84 Pa. St. 487, 507 (1877). It should be remembered, also, that the express powers can be executed without holding that there is an implied power to borrow money. The revenue provisions of charters supply the municipality with the means designed to furnish it with money. And powers are not held to exist merely because they are conven-

ient. *Supra*, secs. 89-91, and notes. As applicable to municipal corporations, there is great and almost convincing force in the argument of *Selden, J.*, in *Curtis v. Leavitt*, *supra*, 267, 268. And see *Ketchum v. City of Buffalo*, 14 N. Y. 356, 365 (1856), where the subject is considered by the same judge, and the power of a municipal corporation to contract debts on credit, for legitimate purposes, is admitted to be a question which has "yet to be judicially settled." *Infra*, secs. 125, 126. See, on the general subject, *Canal Bank v. Supervisors*, 5 Denio, 517 (1848); *Barker v. Loomis*, 6 Hill, 463 (1844); *People v. Brennan*, 39 Barb. 522 (1863). In *Commonwealth v. Pittsburgh*, 41 Pa. St. 278, *Strong, J.*, says that the power to execute and issue bonds is inseparable from the existence of all corporations, public and private. *Douglass v. Virginia City*, 5 Nev. 147 (1869). In *New York*, see *Stat.* 1853, 1135, chap. 603. In *Mississippi*, Boards of Police of counties have no implied power to borrow money; and when special power to borrow money is conferred it must be fairly pursued; and it was held that where a warrant properly signed did not (as required by the statute) state on its face the object for which it was issued, nor upon what fund drawn, it could not be enforced. *Beamair v. Board of Police*, 42 Miss. 238; s. c. 15 Wall. 566. There may be ground for a distinction as to the implied power to borrow money, between counties and ordinary city corporations.

*English Decisions.* — Bond for borrowed money, given after the Municipal Corporations Act, held valid. *Pallister v. Mayor, &c.*, 67 Eng. C. L. (9 C. B.) 774; *Payne v. Mayor, &c.*, 3 Hurl. & Nor. 572. See *Nowell v. Mayor, &c.*, 9 Exch. 457; *Kendall v. King*, 84 Eng. C. L. (17 C. B.) 483. Note for borrowed money held in-



§ 119. **Same subject.**—In Indiana, the doctrine that corporations, along with the express and substantive powers conferred by their charters take by implication all the reasonable modes of executing such powers which a natural person may adopt,<sup>1</sup> is so applied as to hold that it is a power incident to corporations, in the absence of positive restriction, to borrow money as means of executing *their express powers*.<sup>2</sup> In Iowa, school districts have the power to borrow money to discharge debts legitimately created and to pledge the credit of the district for that purpose.<sup>3</sup> In Illinois, the same power exists if authorized *by a vote of the people of the district*.<sup>4</sup> But where a law authorizes the *donation* of money by a municipal corporation to aid in the construction of a railroad, and provides for levying a tax to raise the amounts donated as they become due, neither the corporation nor its officers have the power to borrow money or to

valid under the act. Attorney-General *v. Lichfield*, 13 Sim. 547; *Reg. v. Lichfield*, 4 Q. B. 893. See *Bateman v. Mid-Wales Railway Co.*, L. R. 1 C. P. 510 (1866); *ante*, secs. 117, note, secs. 125, 126.

<sup>1</sup> *New England, &c. Co. v. Robinson*, 25 Ind. 536; *Lafayette v. Cox*, 5 Ind. 38; *Board, &c. v. Day*, 19 Ind. 450; *Kyle v. Malin*, 8 Ind. 34; *Haag v. Board, &c.*, 60 Ind. 511; *Second, &c. Bank v. Danville*, 60 Ind. 504; *Richmond v. McGirr* (quoting text), 78 Ind. 192, 198 (1881); *Board v. Saunders*, 17 Ind. 437. See, also, *Merrill v. Town of Monticello*, 22 Fed. Rep. 589.

<sup>2</sup> *Board v. Day*, 19 Ind. 450; *Miller v. Board*, 66 Ind. 162, citing *Ketchum v. Buffalo*, 14 N. Y. 356; *Mills v. Gleason*, 11 Wis. 470; *State v. Madison*, 7 Wis. 638; *Bank v. Chillicothe*, 7 Ohio, 354; *Moss v. Harpeth Academy*, 7 Heisk. 283; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *Clark v. School Dist.*, 3 R. I. 199; *Hardy v. Merriwether*, 14 Ind. 203; *Sheffield v. Andress*, 56 Ind. 157. Where a city negotiated its bonds to raise means to *construct water-works*, and the city treasurer misapplied a part of the funds so realized, leaving debts unpaid on account of such works, it was competent for the city council to issue and sell other bonds to make up such deficiency. *Daily v. Columbus*, 49 Ind. 169 (1874). Under Ind. Rev. Stat. (1876), authorizing towns to provide apparatus for *extinguishing fires*,

and to incur a debt on petition of taxpayers, levy a tax, &c., the board of town trustees has power to purchase such apparatus *on credit*, and direct a note therefor to be issued in the name of the town. And this power is not exhausted by the passage, pending the negotiation therefor, of an ordinance for issuance of bonds to realize means to purchase the apparatus, if no bonds are in fact issued thereunder. *New Albany Bank v. Danville*, 60 Ind. 504. So, in *Richmond v. McGirr*, 78 Ind. 192, 198, unrestricted power in the city to purchase real estate for public buildings gives to the council implied power, in its discretion, to purchase on credit, and to issue negotiable bonds for the purchase money; the court refused to enjoin the issue of such bonds. *Infra*, sec. 127, and note. As to power to issue bonds for subscriptions *in aid of railroads*, see *post*, sec. 161.

<sup>3</sup> *Austin v. Colony*, 51 Iowa, 102.

<sup>4</sup> *Folsom v. School Directors*, 91 Ill. 404, where it is held that the power to borrow money carries with it at common law, independent of the statute, the power to give evidence of the loan. The power to give bonds for money borrowed is not a limitation but an enlargement of their powers, and an order given by them on their treasurer is valid and may be enforced against the district. *Ib.* The court limits and distinguishes the case of *Clark v. School Directors*, 78 Ill. 474.

issue bonds in payment of such donation, and bonds issued in payment thereof are void.<sup>1</sup>

§ 120. **Same subject. Doctrine in Pennsylvania.** — The subject of the *incidental or implied power of a municipal corporation to borrow money* to pay pre-existing indebtedness, and also to enable it to grade and pave its streets, and to *issue negotiable paper* for this purpose, is elaborately discussed by the Supreme Court of Pennsylvania.<sup>2</sup> It was admitted that "taken in its broad sense, the power to borrow money and issue bonds therefor cannot be said to be among the implied powers of a municipal corporation." But, nevertheless, the majority of the court, after examining the subject and reviewing the authorities, sums up the result in guarded language, as follows: "The foregoing cases rest upon the principle, which we think a sound one, that where a municipal corporation has lawfully contracted a debt, it has the implied power, unless restricted by its charter or prohibited by statute, to evidence the same by a bill, bond, note, or other instrument; that the power to contract a debt carries with it by necessary implication the right to give an appropriate acknowledgment of such debt, and to agree with the creditor as to the time and mode of payment; that in the absence of statutory provision there is no rule of law limiting the extent of the credit." There was a dissent by three judges on the ground that

<sup>1</sup> Lippincott v. Pana, 92 Ill. 24; Mid-  
dleport v. Aetna Life Ins. Co., 82 Ill. 562;  
Dixon County v. Field, 111 U. S. 83. In  
*Nebraska*, county bonds may be issued to  
raise money to meet current expenses in  
case of a deficit in the county revenue,  
but this must first be authorized by a  
vote of the electors of the county. Daw-  
son Co. v. McNamar, 4 N. W. Rep. 991.  
As to implied power in *Nebraska* to  
issue municipal bonds, see *State v. Bab-*  
*cock*, 22 Neb. 614 (1888), cited *supra*,  
sec. 118 n. In *Georgia*, it is held to be  
within the purpose and scope of a mun-  
icipal corporation to apply the corporate  
funds or to create a corporate debt for the  
purchase of an interest in a building to be  
used as a *public school or college* for the  
accommodation of the people of the town;  
and the fact that superintendence of the  
school is left in the hands of trustees not  
elected by the corporation does not render  
the appropriation of the corporate funds  
illegal, it appearing that the enterprise is  
not for any private gain, and that the

trustees contract to keep up, in the build-  
ing, a public school. *Quare. Danielly et*  
*al. v. Cabaniss*, 52 Ga. 211 (1874). In  
*Wyoming*, the law prohibiting the trustees  
of a municipal corporation from incurring  
any debt or borrowing money for the use  
of the city, without having the concur-  
rence of five-eighths of the taxable property  
owners, — to be ascertained by a petition  
for that purpose, — does not preclude the  
trustees from *issuing warrants on the treas-*  
*ury*, to be used as evidences of indebt-  
edness, although there is no money in the  
municipal treasury at the time, nor any  
special authority therefor in the city  
charter. *Ivinson v. Hance*, 1 Wy. Ter.  
270. Difference between warrants and  
negotiable paper, *infra*, sec. 487.

<sup>2</sup> *Williamsport v. Commonwealth*, 84  
Pa. St. 487 (1877). *Paxson, J.*, delivered  
the opinion of the court, in which *Shars-*  
*wood, Mercur, and Gordon, JJ.*, concurred;  
*Agnew, C. J.*, delivered the dissenting  
opinion, in which *Woodward and Sterrett,*  
*JJ.*, concurred.

part of the bonds in question were *issued in advance of any debt incurred* for grading and paving, and as a means of raising money to pay for future improvements; that they were sold at a heavy discount, and the proceeds only thus applied; and while admitting that a municipal corporation may have the implied power to give suitable evidences of an authorized debt actually incurred, they denied any incidental power in such corporations, as a means of raising money to execute its ordinary charter powers or duties, "to issue *commercial* paper, be it bonds or notes, payable to bearer, and negotiable according to the law merchant or general usage, and either to sell them in the market or pass them off to individuals by way of a general loan." The dissenting judges admitted that where *express* power to borrow is given, the municipality has the implied right to issue negotiable evidences of the debt; and they also seemed to concede that if an authorized debt is actually incurred for paving or other proper purposes, the municipality has the right to issue a bond or note or warrant as evidence of it; but it was not said that, even when thus issued, that is, issued by virtue of a merely incidental power, the instrument partook of all the attributes of commercial paper, especially the one which protects such paper in the hands of a holder for value before maturity, from defences of which he has no notice.

§ 121. *Author's comment.* — If the judgment of the court in this case is to be taken as holding that a municipal corporation, merely by virtue of its authority to pave streets, may, without any express power to borrow money, issue its negotiable bonds *in advance*, and sell them as a means of raising money to be applied to this purpose; may issue them in any sum it pleases and sell them for any price it can obtain, and that bonds so issued are commercial paper with all the qualities and incidents of such paper, — if such is the doctrine of the court, we feel constrained to say that we are unable, notwithstanding the ability with which it is supported, to regard it as otherwise than unsound and dangerous.

§ 122. *Decisions of the Supreme Court of the United States.* — The question under consideration has been considered and discussed by the Supreme Court of the United States.<sup>1</sup> Four of the justices as-

<sup>1</sup> Mayor of Nashville v. Ray, 19 Wall. 468 (1873); Ottawa v. Carey, 108 U. S. 110; Hopper v. Covington, 8 Fed. Rep. 777; Merrill v. Monticello, 14 Fed. Rep. 628. In Claiborne County v. Brooks,

111 U. S. 400, the same court decided that the power to issue commercial paper cannot be conceded to *counties and townships*, which are political divisions, unless it is authorized by express legislation or by

sented to the proposition that a municipal corporation possessed no *inherent or incidental power to raise loans or to borrow money for that purpose*; such a power must in their judgment be conferred by legislation, expressly or by plain implication. Indebtedness may be created, it was conceded, for authorized purposes, to the extent permitted, but the legitimate means of paying such indebtedness was by taxation in the usual mode and not by the issue of commercial paper for sale in the market; and such paper, if issued without the sanction of the legislature, although it may be valid as a voucher, is open, into whosoever hands it may come, to all defences.

§ 123. **Same subject.** — It was not denied by the Supreme Court of the United States, in the case referred to in the preceding section,<sup>1</sup> *that the power to borrow might be implied from the existence of express*

very strong implication from such legislation.

This subject being under consideration in *Hackettstown v. Swackhamer*, 37 N. J. L. 191, the able and learned judge who delivered the opinion of the court said, "Municipal corporations, in the absence of a specific grant of power, do not in general possess the capacity to borrow money. A note given by such corporation for an unauthorized loan cannot be enforced, even though the money borrowed has been expended for municipal purposes. Seemingly, a promissory note given for legitimate purposes by a municipal corporation will not have the effect, when in the hands of a *bona fide* holder, of cutting off the equities existing between such corporation and the payee. An examination of the books will show that this question has not as yet received much judicial consideration. The courts of Wisconsin and Ohio have had this matter before them, and have arrived at a result the opposite of that which has just been stated. I have carefully weighed the arguments of these learned tribunals, but they have failed to convince my understanding. The cases referred to are those of *Mills v. Gleason*, and *Bank v. Chilli-cothe*. As a counterpoise to these views stands the weighty opinion of Judge *Dillon* in his treatise on *Municipal Corporations*, Vol. I, sec. 117. Much emphasis is added to this expression of opinion from the fact that this author had before him, at the

time he wrote, the opposing cases just cited. In this state of the authority, it cannot be claimed that the principle is so settled that the judgment of this court cannot be freely exercised with respect to this important subject. My conclusion is that already expressed, that a right to borrow money is not to be inferred from any of the ordinary powers conferred in the charters of municipal corporations, and that, under ordinary circumstances, such a power can proceed only from an express grant to that effect.

"The further question was discussed at the bar, whether a municipal corporation, lacking a special authority to that end, can execute a promissory note. I have examined the subject, but the views already expressed render it unnecessary to pronounce any final conclusion with respect to it; for the purposes of the present case, I may say, however, that my present view is, that a corporate body of this character has the general and inherent right to execute a note as a voucher of indebtedness, but that such note will not have the effect, when in the hands of a *bona fide* holder before maturity, of cutting off the equities existing between the maker and payee. In this respect I fully concur in the learned opinion of Mr. Justice *Bradley*, recently read in the Supreme Court of the United States, in the case of *The Mayor v. Ray*, 19 Wall. 468." *Per Beasley, C. J.*

<sup>1</sup> *Mayor of Nashville v. Ray*, 19 Wall. 468.

powers<sup>1</sup> of such a nature as to be *beyond the ordinary range of municipal expenditure*, and which are usually executed by means of borrowing; but it was denied by four of the judges that such a power was incidental to the ordinary grants of municipal authority. To the author, the brief and compact opinion of Mr. Justice Bradley seems to be a careful and accurate exposition of the law on the subject; but the remaining four justices appear to have considered that it unduly restricted the powers of municipal corporations.<sup>2</sup> The court has since decided that *quasi* corporations, such as counties, have no implied power to issue commercial paper unless by virtue of express legislation or by very strong implication therefrom, and

<sup>1</sup> *Infra*, secs. 127, 161, and note; *ante*, sec. 118, note.

<sup>2</sup> The prior case of *Lynde v. The County of Winnebago*, decided by the Supreme Court of the United States, 16 Wall. 6 (1872), when carefully viewed with reference to the legislation of Iowa as to the powers of the county judge in the erection of court-houses, and the *express power* to borrow money for this purpose when the proposition to borrow is sanctioned by a popular vote, will be found to assert or involve no general principle, but to turn upon the special statutory provisions, and on the construction and effect to be given to the particular proposition that was submitted to the people. That proposition, having been adopted by the voters, was held by the majority of the court to imply the power to borrow money to accomplish the object in view; and assuming the construction adopted to be the true one, the result reached logically followed. That this judgment of the Supreme Court in the case just referred to is not authority in favor of the broad proposition that the power to make contracts, — for example, as in that case, the building of a court-house, — carries with it the power to borrow money, and, as incidental to that, the power to issue negotiable bonds for the money borrowed, will clearly appear when the statutory provisions and the facts in that case are considered. Power to build court-houses when payment therefor is to be made out of the ordinary revenue is conferred by statute upon the county judge without the sanction of a popular vote. When, however, money is to be borrowed for this purpose the statute

requires the proposition to borrow to be submitted to the vote of the people of the county. No proposition to borrow money and to issue bonds was *in terms* submitted to the people; but there was submitted this question, viz., "Shall the county judge, in 1860, levy a tax of seven mills for constructing a court-house in the county, said tax to be levied from year to year until a sufficient amount is raised for that purpose, not, however, to exceed ten years." The proposition having been carried, a majority of the court (three judges dissenting) held that under the Iowa statute the vote gave the authority to borrow money and issue the bonds. Mr. Justice *Swayne* said, "It was expressed in this formula (of the vote taken), that a court-house was to be built, and we think that it was implied that money was to be borrowed to accomplish that object. Otherwise the vote gave no authority which did not already exist, and was an idle ceremony. The statute authorized an appeal to the voters only that they might give or refuse authority to incur a debt. It could not have been intended that the erection should be delayed till a sum sufficient to pay for the structure had been realized from the tax authorized to be imposed, or that the work should proceed only *pari passu* with the progress of its collection from year to year. What is implied is as effectual as what is expressed."

The dissenting judges said, "We cannot find in this vote any authority in the county judge to issue the bonds of the county."

although the county may have power to erect a court-house and other necessary public buildings, this does not authorize the issue of commercial paper for that purpose.<sup>1</sup>

§ 124. **When Power will be held to exist.** — *The nature and extent of the power to borrow money and issue negotiable paper therefor* was considered at length by the United States Circuit Court for Missouri,<sup>2</sup> in which after a review of the decisions — English and American — the following conclusions were reached: Whether a municipal corporation possesses the power to borrow money, and to issue negotiable securities therefor, depends upon a true construction of its charter and the legislation of the State applicable to it. It has no *incidental or inherent authority* under the usual grants of municipal powers as a means of discharging its *ordinary municipal functions*. Such authority *may be inferred from special and extraordinary powers*, which require the expenditure of unusual sums of money, when it is usual to execute such powers by means of borrowing, and when, upon the whole legislation applicable to the municipality, such appears to have been the legislative intent.<sup>3</sup> These principles were applied; and coupon bonds to borrow money to erect and repair wharves and to open streets, *issued under the general grants of municipal power in the charter*, were held *not* to be binding upon the city, while other bonds *issued under a special act of the legislature, in payment of stock in companies* organized to construct macadamized roads from the city, were held to be valid.

§ 125. **Author's Views and Conclusions summed up.** — Whether there is *power in a municipal corporation to borrow money and to issue negotiable paper* depends, we think, upon the legislative intent, to be collected from statutes, general and special, applicable to the municipality or to the particular case in hand. The American cases are conflicting and cannot be harmonized.

The following summarizes our view of the sound and true doctrines on this subject: —

<sup>1</sup> Claiborne County v. Brooks, 111 U. S. 400 (1883); approving Police Jury v. Britton, 15 Wall. 566; distinguishing Lynde v. County of Winnebago, 16 Wall. 6, where the county had express legislative authority to borrow money for the erection of public buildings when authorized by the voters at an election called for the purpose. *Ante*, sec. 122, and notes.

<sup>2</sup> Gause v. Clarksville, 5 Dillon, 165, 183 (1879). Thomas v. Port Hudson, 27 Mich. 320 (1873), declares the remedy to

be for the money or property received. *Post*, secs. 125, 126, 161 and notes. The remedy where bonds of a city are issued without authority and the money thereon is actually received by the city, is not an action on the bonds, but to recover the money. Gause v. Clarksville, *supra*. See also Robertson v. Breedlove, 61 Tex. 316. *Infra*, sec. 126 note.

<sup>3</sup> *Infra*, sec. 161, and note; and *post*, chap. xiv. on Contracts.

1. The power to borrow money as a means of raising a fund to make future local improvements, or to carry on the ordinary operations of the municipality, cannot be implied from the *mere* authority to make such improvements or from the usual grants of municipal power. These contemplate that the expense of the execution of the ordinary municipal powers shall be met by the revenues derived year by year from taxation.

2. It does not follow because banking, trading corporations and other private corporations organized for pecuniary profit are held in this country to possess the incidental power to borrow money, and to issue commercial paper having all the qualities attributed to such paper by the law merchant, that a like power is inherently possessed by public and municipal corporations.<sup>1</sup> The analogy is false and

<sup>1</sup> As to the power of corporations to issue commercial paper, the law of England is settled. In *England* no corporation, whether municipal (Reg. v. Lichfield, 4 Ad. & El. N. s. 891, 906) or private (Bateman v. Mid-Wales Railway Co., L. R. 1 C. P. 499, 1866), has the incidental right to make commercial paper, except the Bank of England, which was incorporated for the very purpose, and trading corporations strictly, such as the East India Company. Accordingly it is laid down by Mr. Justice Byles, in his work on bills, that, "without special authority, expressed or implied, a corporation has no power to make, indorse, or accept bills or notes." Byles on Bills (8th Eng. ed.), 62; Grant on Corp. 276. Thus, a water-works company (Broughton v. Manchester Water-Works, 3 Barn. & Ald. 1), a gas joint-stock company (Bramah v. Roberts, 3 Bing. N. C. 963), or even trading companies, unless such a power is essential to the purposes for which they are formed (Bateman v. Railway Co., *supra*), have no general or implied authority to make commercial paper. In Bateman's case, last cited, the question for the first time arose in England, as late as 1866, as to the right of a railway company, with an authorized capital of £170,000, to make or accept bills of exchange, and it was unanimously decided, by judges of great eminence (Erle, C. J., Byles, Keating, and Montague Smith, JJ.), that the company had no such power. The acceptance was under seal, and it is a mistake to suppose that

the decision rested on the technical ground that a corporation can only contract under seal. It was placed upon the broad ground that there was no act of parliament, general or special, which conferred the power. It was admitted by all the judges that the railway company might incur debts in the construction or operation of the road; "but it is one thing," says Keating, J., "to say that they shall be liable to be sued for goods sold and delivered or for work done, and an entirely different thing to say that they may accept bills in payment." And to the same effect was the opinion of the other judges. The principle of this case was approved in *The Peruvian, &c. Railway Co. v. Thames, &c. Insurance Co.*, L. R. 2 Ch. 617, when a general incidental power to issue bills of exchange and negotiable instruments under the Companies Act of 1862 was denied, and the power held to depend upon the proper construction of the memorandum and articles of association. The companies organized under that act may communicate this power to their directors, but it must be given expressly or by fair intendment in the memorandum and articles of association of the company, or it will not exist. In England, as shown by Bateman's case, *supra*, it is held that, inasmuch as the corporation has no power to accept bills, it cannot be made liable on its acceptance, though the bill was drawn for a valid and binding debt. On this point Erle, C. J., says: "The bill of exchange is a cause of action, a contract, by itself,

delusive. The purposes of the two classes of corporations, the powers of their officers, and the means of making provision for meeting their liabilities, are all essentially different. The nature of the usual duties devolved by law upon municipalities does not make it necessary to imply the existence of a *general power* to borrow money and to issue commercial paper. The consequences of recognizing such a power, in the extravagance it will stimulate, in the frauds it will engender, and in the onerous indebtedness it will inevitably produce, are alarming to contemplate. The history of the express power given to municipalities to aid railways by borrowing money and issuing commercial obligations is full of warning and instruction.

3. The power to issue commercial paper which is unimpeachable in the hands of the holder is not among the ordinary incidental powers of a public or municipal corporation. It must be conferred expressly, or by fair implication, as a necessary, or at least a reasonable and usual means of executing the particular power to which it is claimed to be incidental.

4. *Express power to borrow money*, perhaps in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as for example subscriptions to aid railways and other public improvements, will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability.<sup>1</sup>

which binds the acceptor in the hands of an indorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad, or whether, in the case of the corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purpose for which the acceptors are incorporated. It would be inconvenient to the last degree if such an inquiry could be gone into. Some bills might be given for a consideration which was valid, as for work done for the company, and others as a security for money obtained on loans beyond their borrowing powers. It would be a pernicious thing to hold that, in respect of the former the corporation might

be sued by an indorsee, but in respect of the latter, not." See subject discussed in *Gause v. Clarksville*, 5 Dillon, 165 (1879).

In *America* the courts, however, have generally held that banking, trading, commercial, railway, and other *private* corporations, organized for pecuniary profit, have an incidental power to issue commercial paper when such power is not negatived by a true construction of their charters or constituent acts. See *ante*, secs. 117, 118; also chapter on Contracts, *post*.

<sup>1</sup> *Ante*, sec. 117, note; *post*, secs. 127, 161, note, and chap. xiv. on Contracts, sec. 507 *et seq.*; *Williamsport v. Commonwealth*, 84 Pa. St. 487; *Commonwealth v. Pittsburg*, 34 Pa. St. 496; *Reinboth v. Pittsburg*, 41 Pa. St. 278; *Middleton v. Allegheny Co.*, 37 Pa. St. 241; *Seybert v.*



5. When it is expressly provided by statute, that public and municipal corporations shall audit all claims presented, and shall *issue to the creditor warrants or orders*, and no other provision is made, this will not authorize as a means of payment the issue of negotiable or commercial paper which shall possess all the incidents of negotiability; and if issued, it is subject to all defences in the hands of a transferee to which it would be subject in the hands of the original holder.<sup>1</sup>

6. Although a municipal corporation proper, in the execution of its ordinary corporate powers and the discharge of its corporate duties, may make contracts and create debts, and may, when not restrained by statute, evidence the liabilities thus incurred, yet if the instrument is made to assume the form of negotiable paper, such paper is always open to defences in the hands of transferees when it is issued without express authority from the legislature, or authority fairly to be implied from the charter or legislation applicable to the municipality.<sup>2</sup>

§ 126. **Same subject.** — Stated in other words, the author regards it as the true doctrine that, *merely as incidental to the discharge of*

Pittsburg, 1 Wall. 272; Galena v. Corwith, 48 Ill. 423; Kelly v. Mayor, 4 Hill (N. Y.), 265; DeVoss v. City Richmond, 18 Gratt. 338; R. R. v. Evansville, 15 Ind. 395; Police Jury v. Britton, 15 Wall. 572; Daniel on Nego. Inst. secs. 1527 and 1531; Rogers v. Burlington, 3 Wall. 654, 666; Milner's Admr. v. Pensacola, 2 Woods, 637; Mayor v. Inman, 57 Ga. 370; Tucker v. City of Randolph, 75 N. C. 267; City of Vicksburg v. Lombard, 51 Miss. 125; Mercer Co. v. Hacket, 1 Wall. 95. See cases cited in notes to sec. 488, *post*. In Holmes v. Shreveport, 31 Fed. Rep. 113 (1887), the Circuit Court of the United States, Boorman, J., while recognizing the rule that there is no implied general power to issue commercial paper (*Ib.* p. 115), held that a city vested with extensive powers and authorized to contract for the construction of public works, to give bonds, &c., had power to issue bonds to evidence the credit part of the price agreed to be paid to the contractor for certain public works, and that such bonds are protected by the law merchant in the hands of a *bona fide* holder. See also Dorian v. Shreveport, 28 Fed. Rep. 287. As to *public buildings*, *post*, sec.

140, where a municipality is given express power to "negotiate loans in anticipation of the revenues thereof," bonds negotiable in form are not void, but they lack the characteristics with which actual negotiability would clothe them. Sioux City v. Weare, 59 Iowa, 95.

<sup>1</sup> For difference between such warrants and orders and negotiable paper, see *post*, sec. 487.

<sup>2</sup> The arguments in support of the propositions of the text embodied in this section will be found to be ably presented by Bradley, J., in *The Mayor of Nashville v. Ray*, 19 Wall. 468 (1873); by Beasley, C. J., in *Hackettstown v. Swackhamer*, 37 N. J. L. (8 Vroom) 191 (1874); and by Agnew, C. J., dissenting in *Williamsport v. Commonwealth*, 84 Pa. St. 487, 505 (1877). See also Gause v. Clarksville, 5 Dillon, C. C. R. 165 (1879); Knapp v. Hoboken, 39 N. J. L. (10 Vroom) 394 (1877).

The authorities in favor of the other view are collected, and the argument in support of that view is presented with fulness, in the opinion of the majority of the court, delivered by Paxson, J., in *Williamsport v. Commonwealth*, *supra*.

*its ordinary corporate functions*, no municipal or public corporation has the right to invest any instrument it may issue, whatever its form, with that supreme and dangerous attribute of commercial paper which insulates the holder for value from defences and equities which attach to its inception. This point ought to be guarded by the courts with the utmost vigilance and resolution.<sup>1</sup>

§ 127 (83). **Express Power to borrow Money; Negotiable Paper.**—*Express power* to a municipal corporation "to borrow money" is usually held to include the power to issue its negotiable bonds, or other securities to the lender.<sup>2</sup> But it does not include the power

<sup>1</sup> If money is improperly borrowed in advance of liabilities actually created, and reaches the municipal treasury, and is expended by direction of the governing body for authorized municipal objects, the municipality may then in the absence of controlling statute or constitutional provision to the contrary (see *post*, secs. 130-138) be liable in the proper action or suit; but the action should be, we think, for money had and received or by suit in equity, and not upon the invalid bonds. *Bateman v. Mid-Wales Railway Co.*, L. R. 1 C. P. 499 (1866); *Thomas v. Port Hudson*, 27 Mich. 320; *Hackettstown v. Swackhamer*, 37 N. J. L. 191; *Reg. v. Lichfield*, 4 Ad. & El. N. s. 891, 906; *Mayor &c. v. Ray*, 19 Wall. 468, 480, *per Bradley, J.*; *ante*, sec. 124, note. *The holder of such bonds, will, it seems, be considered as the assignee and owner of the original claim of the payee.* *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Mayor &c. v. Ray*, 19 Wall. 468, 484, *per Hunt, J.*; *Shirk v. Pulaski County*, 4 Dillon, 208 (1877); *Paul v. Kenosha*, 22 Wis. 266; *Gause v. Clarksville*, 5 Dillon, C. C. 165 (1877); *post*, secs. 130-138, note; chapter xiv. on Contracts. In *Hackettstown v. Swackhamer*, *supra*, any remedy upon the unauthorized note was denied, and *Beasley, C. J.*, seemed to think the only remedy was in equity to be subrogated to the rights of the creditors of the corporation who had been paid by the proceeds of the money improperly borrowed; but no necessity is perceived for so strict a doctrine.

<sup>2</sup> *Commonwealth v. Pittsburgh*, 34 Pa. St. 496, 511 (1859); *Railroad Co. v. Evansville*, 15 Ind. 395, 412 (1860); *Mid-*

*leton v. Allegheny Co.*, 37 Pa. St. 241; *Reinboth v. Pittsburgh*, 41 Pa. St. 278; *Seybert v. Pittsburgh*, 1 Wall. 272; *Rogers v. Burlington*, 3 Wall. 654, 666, *per Clifford, J.*; *DeVoss v. Richmond*, 18 Gratt. (Va.) 338; s. c. 7 Am. Law Reg. (N. s.) 589; *Galena v. Corwith*, 48 Ill. 423 (1868); *post*, sec. 488; *German Bank v. Brenham*, 35 Fed. Rep. 185 (1888). Money borrowed, and note given by officers of a town, without authority, does not bind the town in case it never receives the benefit of it. *Benoit v. Conway*, 10 Allen, 528; *People v. Supervisors*, 34 N. Y. 516; *Police Jury v. Britton*, 15 Wall. 566.

The ground has been broadly taken, that for debts and obligations lawfully created, any corporation, public as well as private, has the implied authority, unless prohibited by statute, charter or by-law, to evidence the same by the execution of a bill, note, bond, or other contract, and to secure the same by a mortgage, pledge, or other proper disposition of its property; that power to contract a debt carries with it the power to give a suitable acknowledgment of it; and there is no rule of law in the absence of a statute limiting the length of the credit. *Municipality v. Mc Donough*, 2 Rob. (La.) 242, 250 (1842); *Barry v. Merchants' Express Company*, 1 Sandf. Ch. 280; cited with approval in *Curtis v. Leavitt*, 15 N. Y. 9, 62, and in *Smith v. Law*, 21 N. Y. 296, 299 (1860); *Bank, &c. v. Chillicothe*, 7 Ohio, Part II. 31 (1836); *Ketchum v. Buffalo*, 14 N. Y. 356 (1856), market-house bonds given on twenty-five years' time held valid; and see cases cited on

to issue notes to circulate as money, in violation of the statute law and public policy of the State.<sup>1</sup>

page 375, by *Wright, J.*; *Douglass v. Virginia City* 5 Nev. 147; *Richmond v. McGirt*, 78 Ind. 192 (1881), noted *supra*, sec. 119, note. See, also, and compare, *Bateman v. Mid-Wales Railway Co.*, L. R. 1 C. P. 510; *Hackettstown v. Swackhamer*, 37 N. J. L. 191; *Wyandotte v. Zeitz*, 21 Kan. 649; *Lawrence v. Kellam*, 11 Kan. 512.

As to express power to issue bonds, &c., see also *Bank of Rome v. Village of Rome*, 18 N. Y. 38, 44, and cases cited; *Mills v. Gleason*, 8 Am. Law Reg. 683; *Louisiana State Bank v. Orleans Navigation Co.*, 3 La. An. 194. State bonds negotiable. *Delafield v. Illinois*, 2 Hill, 159.

Express power to a municipal corporation to subscribe for stock in a railroad corporation does not carry with it the power to issue negotiable bonds in payment of the subscription, unless the power to issue such bonds is expressly, or by reasonable implication, conferred by the statute; and such power is negated where the statute authorizing the subscription is silent as to the issue of bonds, and makes special provision for the payment of the subscription by taxation. *Kelley v. Milan*, 127 U. S. 139, 150, and cases cited; *Norton v. Dyersburg*, 127 U. S. 160, and cases cited. *Post*, sec. 161, note. As to the implied power to issue municipal bonds, see further, *Wells v. Supervisors*, 102 U. S. 625; *Claiborne County v. Brooks*, 111 U. S. 400; *Ottaway v. Carey*, 108 U. S. 110, 123; *Daviess County v. Dickinson*, 117 U. S. 657, 663.

Power "to borrow money" held to include power to issue negotiable bonds or other usual securities to the lender. *Commonwealth v. Pittsburg*, 34 Pa. St. 496, 511; *Rogers v. Burlington*, 3 Wall. 654 (1865); *ante*, sec. 117. Board of Supervisors of a county have not power to issue bill of exchange. *Canal Bank v. Supervisors, &c.*, 5 Denio, 517 (1848). Nor have village trustees. *Lake v. Trustees*, 4 Denio, 520. Corporate city has the power. *Kelly v. Mayor*, 4 Hill, 263; compare *Clark v. Des Moines*, 19 Iowa,

199, 213. In *Inhabitants, &c. v. Weir*, 9 Ind. 224 (1857), an action against a congressional township upon a promissory note made by the trustees, the court, *per Stuart, J.*, says: "There is no power to make notes conferred by the act of 1841. That act was the charter under which they acted. The trustees, as a corporation, had no power but such as that act expressly conferred, and such as might arise by implication, or be essential to the exercise of those granted. Such a power is always expressed, even in bank charters. In so limited a corporation as a congressional township, the power to make promissory notes could hardly be implied. The case at bar cannot easily be distinguished in principle from *McClure v. Bennett*, 1 Blackf. 189, and *Mears v. Graham*, 8 Blackf. 144." Power to borrow money, if granted on condition of a previous popular vote, must be exercised in conformity with the condition or the orders issued therefor will be void. *Lockport v. Gaylord* 61 Ill. 276 (1871). What amounts to a borrowing. *Id.* In *Illinois* the Constitution of 1848 gave to municipal corporations the power to assess and collect taxes for corporate purposes. This was construed to be a limitation upon the taxing power of the State, under which such corporations could not be taxed except for corporate purposes; and, consequently, bonds issued "for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes," were declared void, although the enterprise intended to be aided was recognized as being of general interest and of great value to the city. *Mather v. Ottawa*, 114 Ill. 659. *Post*, secs. 159, 736.

<sup>1</sup> *Thomas v. Richmond*, 12 Wall. 349 (1871).

Construction of the constitutional power of the general government to "borrow money." See *Hepburn v. Griswold*, 8 Wall. 603, *Knox v. Lee*, 12 Wall. 457 (1871), and *Juilliard v. Greenman*, 110 U. S. 421 (1884), known as the "legal-tender cases."

§ 128. **The Subject illustrated; Place of Payment, etc.** — Express charter power to *borrow money for general purposes, not exceeding a specified sum*, was held by the Supreme Court of the United States, upon an examination of the nature of other powers contained in the charter, not to prohibit or limit the city in incurring an indebtedness for *authorized purposes* greater than the sum it was empowered to borrow.<sup>1</sup>

§ 129 (84). **What is a borrowing; Power construed.** — A *contract* whereby a city agrees with an individual that if the latter will pay or advance the amount of interest due and to become due on certain bonds of the city already issued, the city will pay or refund the amount, is "*not a borrowing of money*" within the terms or spirit of the charter prohibiting the municipal authorities from borrowing money unless authorized by a prior vote of the citizens; such a contract being one simply for the payment of a debt.<sup>2</sup> Under authority to a city to borrow money, it may, if there be no statutory restriction, make *the principal and interest payable at the place where the money is borrowed or where it pleases, though beyond the limits of the State*.<sup>3</sup> Among certain powers of a strictly municipal nature conferred upon a city was the power "to borrow money for any object in its discretion," or "for any public purpose," on a two-thirds vote of the citizens; and this was held, in connection with a general statute of the State, recognizing by implication (as construed) the validity of city and county bonds generally, to authorize such city to issue bonds to aid in the construction of a railway or plank road leading to, through, or from the city.<sup>4</sup>

<sup>1</sup> Hitchcock v. Galveston, 96 U. S. 341 (1877); approved, United States v. Fort Scott, 99 U. S. 152.

<sup>2</sup> Gelpecke v. Dubuque, 1 Wall. (U. S.) 221 (1863), *Miller, J.*, dissenting. Where a city can make such a contract, with the sanction of a prior vote, the sanction will, in an action on such a contract, be presumed until the contrary is shown by the city. *Ib. per Swayne, J.*

<sup>3</sup> Meyer v. Muscatine, 1 Wall. (U. S.) 384 (1863). In this case, the court, *per Swayne, J.*, say (1 Wall. 391): "The power of a municipal corporation to make any contract does not depend upon the place of performance, but upon its scope and object. A city authorized to establish gas-works and water-works, and to gravel its streets, may buy water, coal, and gravel beyond its limits, and agree to

pay where they are found, or elsewhere. The principal power, when expressed, draws to it, by necessary implication, the means of its execution. This is the settled rule in the construction of all grants of authority, whether to governments or individuals." *Express authority to a city "to borrow money"* necessarily implies the power to determine the time of payment, and to issue bonds or other evidence of indebtedness, to borrow within or without the State, and to agree to pay where borrowed. *Railroad Co. v. Evansville*, 15 Ind. 395, 412 (1860), distinguished as to place of payment from *Prettyman v. Tazwell Co.*, 19 Ill. 406; 22 Ill. 147, which were regarded as turning upon peculiar statutory provisions. See further, chapter xiv. on Contracts, *post*.

<sup>4</sup> Meyer v. Muscatine, 1 Wall. (U. S.)

§ 130 (85). **Special Limitations on the Power to become indebted; Creation of Debt defined.**—Provisions are frequently made in Constitutions or in charters or legislative acts to *prevent the creation or increase of municipal indebtedness beyond specified limits or except upon certain conditions*. Such limitations have been found by experience to be necessary to prevent extravagance, are remedial in their nature, are based upon the wise policy of paying as you go, and ought, therefore, to be construed and applied to secure the end sought. The cases referred to will show that the courts have fairly given them full effect. The judicial construction of some of these provisions will be noticed in this place.

The Constitution of Maryland contains a provision that "*no debt shall be created by the mayor and city council of Baltimore*" (except for specified temporary purposes), *unless it shall be first sanctioned by the legislature and approved by the voters of the city*. The city, being the owner of a large amount of stock in the Baltimore and Ohio Railroad Company, without previous legislative authority or the approval of the voters passed an ordinance to provide for the *raising* of one million of dollars by hypothecating its railroad stock, and for the investment of the same in the bonds of another railroad company whose road was in process of construction. The validity of this ordinance being drawn in question, the court considered it to be plain that the constitutional provision quoted was intended to prohibit the city from aiding in the construction of works of internal improvement without the previous assent of the legislature and of a majority of the voters of the city; and that the ordinance (notwithstanding the ingenious use of the phrase *raising* instead of *borrowing* money, and the further provision that the parties furnishing the money should look for its repayment exclusively to the stock pledged, and that the city should not be responsible for any deficit) did create a debt within the meaning of the Constitution, and was therefore void.<sup>1</sup>

384 (1863), *Miller, J.*, dissenting, in an opinion of marked ability; *Mitchell v. Burlington*, 4 Wall. 270 (1866); *Rogers v. Burlington*, 3 Wall. 654 (1865). General power granted to a city to create a debt will be construed to mean debts for *specified, legitimate, and proper municipal purposes*, and not for any or all purposes, at the discretion of the city council or inhabitants. *Lafayette v. Cox*, 5 Ind. (Porter) 38 (1854). *Limitation on taxing power does not limit power to contract debts*. *Emerson v. Blairsville*, 2 Pittsb. (Pa.) Rep. 39; *post*, sec. 162. See, further, ch. xiv. on Contracts, *post*.

<sup>1</sup> *Baltimore v. Gill*, 31 Md. 375 (1869), distinguished, *Richmond v. McGirr*, 78 Ind. 192, 196 (1881). That a debt may be *created* by borrowing money, although there be a provision exempting the borrower from liability beyond the property pledged, see *Newell v. People*, 3 Seld. (7 N. Y.) 9, 87. Where a municipal corporation is *forbidden by the Constitution* to become indebted in any amount exceeding a specified limit, *held*, 1, that if it exceed the limited amount it may be enjoined; 2, that the bill is maintainable by a citizen and taxpayer of the place. *Springfield v. Edwards*, 84 Ill. 626 (1877). Remedy of

§ 131 (86). **Special Charter Limitations construed.**— Under a charter prohibiting the common council of a city from “*authorizing any expenditure for any purpose,*” in the current political year, *ex-*

taxpayer, see *post*, secs. 914–922. Such a limitation was held to forbid *implied* as well as express indebtedness, and to be binding equally upon courts of equity and of law. *Litchfield v. Ballou*, 114 U. S. 190 (where relief in equity was denied to one who had loaned money to a city, in excess of its constitutional limit of indebtedness, which had been used in constructing public works, and who prayed for a return of the money). Where the contract of a town to issue its bonds was illegal because the issue would create a debt in excess of its power under the Constitution to contract, the fact that it afterwards, under the general municipal incorporation law, became a city with power to create a debt in a greater amount, was held not to validate the contract made while it was a town, and that the city could not ratify the contract. *Waxahachie v. Brown*, 67 Tex. 519; *Gould v. Paris*, 68 Tex. 511.

The charter of Atlantic City in New Jersey contained a limitation that its debt “shall at no time exceed \$35,000.” The city was indebted in this sum when it entered into a contract with a water company to supply itself with water for public purposes for an indefinite period, making no provision, however, to raise by taxation the amount that the city could be called on to pay under the contract. On *certiorari*, bringing up the contract for judicial review, it was held that the contract and ordinances were *ultra vires*, and the same were set aside. After reviewing the cases cited *infra*, sec. 136 *et seq.*, from Iowa, Illinois, Indiana, and Pennsylvania, *Magie, J.*, said: “It is impossible, perhaps, to entirely reconcile these cases. The true interpretation of such restrictions on municipal indebtedness, in my judgment, lies between the extremes they exhibit. The plain object of such restrictions is to require that all moneys which are to be paid for municipal expenses, after the debt has reached the fixed limit, shall be raised by taxation. In view of this object, it is clear (and all the cases agree in this) that prohibitions against increasing the indebtedness, or the debt, of a municipality are

not to be construed as limited to obligations which are debts *eo nomine*, but are to be extended to all contracts for the payment of money or contracts whereon the payment of money may be enforced. But where the money to be paid upon such contracts is provided for, to be raised by taxation upon some fixed and definite scheme, such contracts are not, in my judgment, within such prohibitions. Where, however, the money required to meet such contracts is not provided for, either by being legally ordered to be raised by taxation and appropriated for that purpose, or by some legislative scheme which positively prescribes that it shall be raised by taxation and appropriated for its payment as needed, then such contracts do increase the indebtedness or debt of municipal corporations within the meaning of such prohibitions. Any other construction would deprive these restrictions of the force requisite to reach and cure the evil intended to be prevented thereby.” *Read v. Atlantic City*, 49 N. J. L. (20 Vroom) 558.

In *Louisiana* it was held that an act of the legislature prohibiting counties and cities from thereafter “contracting any debt or pecuniary liability, without fully providing, in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted,” does not extend to a liability for ordinary street work, which forms part of the current expenses of the corporation, and which may be paid out of its current revenues. *Reynolds v. Shreveport*, 13 La. An. 426 (1858). A provision in a city charter that the council shall not have power to pledge the credit of the city for more than a specified sum *without submitting the question to the voters of the city* was regarded as a definite restriction on the power; and hence a statute authorizing the city to issue bonds to defray the expenses of building a bridge is subordinate to, and does not override, the restriction in the charter. *Cumberland v. Magruder*, 34 Md. 381 (1871). But see *Butz v. Muscatine*, 8 Wall. 575 (1869); *post*, sec. 162.

ceeding the amount of the annual tax levy, the council cannot authorize any expenditure to be made within the year exceeding the limit; but they are not forbidden to authorize in that year an expenditure to be made in a subsequent year, for services to be performed in such subsequent year.<sup>1</sup> The charter of *Chicago* contained the provision that "no contract shall be made by the common council, and no expense incurred unless an appropriation shall have been previously made concerning such expense," and the comptroller is required to submit each year an estimate of the amount necessary to defray the expenses of the city for the current year. With this provision in force the city made a contract with a gas company whose works were already complete to take gas for its streets and public buildings at a specified price for the period of ten years. This contract was held invalid on the ground that under the above charter provision there was no actual or reasonable necessity to make a contract extending over ten years, no appropriation having been made commensurate with the obligations of the contract; and aside from the special provision of the charter, the court inclined to the same result on the ground that the power was legislative and that the council could not, without any reasonable necessity appearing, bind their successors for ten years or indefinitely. Drummond, J., added, "In all cases of contracts to run for years, the authority to make them should be clear. It is better that all parties should understand there is a limit to the power of municipal bodies in such cases."<sup>2</sup>

§ 132. **Special Charter Limitation construed.**—The city of *Galveston* under a provision of its charter authorizing it to construct sidewalks and make street improvements and to reimburse itself for

<sup>1</sup> *Weston v. Syracuse*, 17 N. Y. 110 (1858). See, also, *Cook v. City of Buffalo*, 1 Clinton's N. Y. Digest, "Buffalo," sec.

2. Limitation on rate of tax to be annually levied construed. *State v. Mayor*, 23 La. An. 358. *Funded debts.*—The charter of a city provided that "no funded debt shall be contracted." It was decided, that a city bond, issued on time, for the purchase of market grounds, was not a funded debt. *Ketchum v. Buffalo*, 14 N. Y. 356. Meaning of "funded debt" and "funding" considered by *Selden, J., Ib.* p. 367, and by *Wright, J., p. 378*. City may fund valid bonds and issue new bonds therefor, without express authority. *Galena v. Corwith*, 48 Ill. 423 (1868);

*Burr v. Carbondale*, 76 Ill. 455, 474 (1875). See *Smith v. Morse*, 2 Cal. 524; *Police Jury v. Britton*, 15 Wall. 566; *ante*, secs. 63, 69.

<sup>2</sup> *Garrison v. Chicago*, 7 Biss. 480 (1877), *Drummond, J., ante*, sec. 97. The statute of *California*, which declares that the board of supervisors must not contract debts and liabilities which, added to the salaries of officials, will exceed the revenue of the county for the year, does not mean by "revenue" the actual amount of money received into the County Treasury, but the estimate of the board of supervisors of what the revenue will be. *Babcock v. Goodrich*, 47 Cal. 488 (1874).

the expense from abutting lot owners, made a contract for local improvements of this character which created a liability exceeding \$50,000. This contract was claimed by the city to be invalid by reason of another provision of the charter, that the *council shall not borrow money for general purposes to an amount greater than \$50,000*. The Supreme Court of the United States held the objection to the validity of the contract not to be well taken; and the reasons for its judgment, as stated by Mr. Justice Strong, are given in the note.<sup>1</sup>

§ 133. **Prohibitory Statute construed.** — Under a statute which was passed to *prohibit the making of contracts by unauthorized official agents for supplies* for the use of the city of New York, if a contractor makes a contract without observing the protective requirements of the statute and furnishes supplies thereunder, the city is not bound, although the materials supplied were used by it, and an implied liability cannot be raised in the face of the words and purpose of the statute.<sup>2</sup>

§ 134 (87). **Special Charter Provision construed.** — A municipal charter provided that it *should not be lawful* for the city council to

<sup>1</sup> *Hitchcock v. Galveston*, 96 U. S. 341 (1877). Approved, *U. S. v. Fort Scott*, 99 U. S. 152 (1878). "The limitation," says *Strong, J.*, in the case first cited, "is upon the power to borrow money, and to borrow it for *general* purposes. It implies that there may be lawful purposes which are not general in the sense in which that word is used in the charter. An examination of the whole instrument, and of the numerous and large powers conferred upon the council, as well as duties imposed, makes it evident that the provision could not have been intended to prohibit incurring an indebtedness exceeding the sum named. It is in no sense a limitation of the debt of the city. If it is, the grant of power the charter contains was an idle thing, and the duties imposed could not be performed. The council, as we have seen, is empowered to grade and pave the streets, and to construct sidewalks. There is no express limitation of these powers. Their exercise necessarily involves large expenditure. Such expenditure is, therefore, authorized. It is a plain incident of the power, and it is a special expenditure.

It is for a new work, unlike the work of keeping in repair. Conceding that it is a purpose of the act incorporating the city, it cannot be regarded as a general purpose, for if it is, all purposes of the charter are general. Grading a street or making a sidewalk, where none had existed before, is a special improvement, not like repairs of constant recurrence. By another article of defendant's charter the city council was authorized to provide by ordinance special funds for special purposes, and to make the same disburseable only for the purpose for which the fund was created. For these reasons we are of opinion that the limitation upon the power of the council to borrow for general purposes did not make the agreement with the plaintiffs invalid."

<sup>2</sup> *McDonald v. New York*, 68 N. Y. 23 (1876); s. c. 23 Am. Rep. 144, distinguishing *Nelson v. Mayor, &c.*, 63 N. Y. 535; and *Argenti v. San Francisco*, 16 Cal. 255, as to implied liability. See *Gould v. Paris*, 68 Tex. 511; *post*, secs. 135, note, 460; *ante*, secs. 124, note, 126, note.



make, or authorize to be made, "*any contract for the payment of money beyond the current fiscal year,*" declaring every such prohibited contract "illegal and void." In construing this language the court says: "By this section of the charter, the legislature have, in the most explicit manner, prohibited the city council from contracting any debt beyond the fiscal year. If the city council had, at the time the contract was made in 1845, passed an ordinance that the expense of lighting the streets of the city for that year should be paid in 1848, by a tax *then* assessed for that purpose, it would have come within the letter of the prohibition. It is none the less a violation of its spirit that the council did not pass the ordinance providing for its payment until 1848."<sup>1</sup>

§ 134 a. **Constitutional Provisions of California and of Colorado construed.**—The Constitution of California provides that no municipal corporation "*shall incur any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose,*" &c.; and this provision is held to mean that, subject to the exception, "each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability in any one year shall be paid out of the income or revenue of any future year."<sup>2</sup> By the Constitution of Colorado "*no county shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings,*" &c., and "the aggregate amount of indebtedness of any county for all purposes exclusive of debts contracted before the adoption of this Constitution, shall not exceed at any time" a specified rate. The Supreme Court of that State, ruling upon a contention that the limitation was upon indebtedness "by loan," held that, "while these two propositions are associated they are none the less independent declarations;" that in deter-

<sup>1</sup> *Per Caldwell, J., Jonas v. Cincinnati*, 18 Ohio, 318, 322 (1849); distinguished, *Richmond v. McGirr*, 78 Ind. 192, 197 (1881). *Construction of similar provision in other charters.* *Goodrich v. Detroit*, 12 Mich. 279; *Philadelphia v. Flanigen*, 47 Pa. St. 21; *Johnson v. Philadelphia*, *Ib.* 382; *Wallace v. San Jose*, 29 Cal. 180; *Bladen v. Philadelphia*, 60 Pa. St. 464, construing an act applying to the city, to the effect that no debt shall be binding unless authorized by law or ordinance, and a sufficient appropriation therefor be

made. Where a charter forbade a city to contract a debt exceeding in any one year the revenue for that year, a contract for a term of thirty years for the use of water was held to create a liability to the full extent of the term, and that as the aggregate liability was in excess of the revenue of any one year the contract was void. *Niles Water Works v. Niles*, 59 Mich. 311. *Infra*, secs. 135, note, 136, 136 a.

<sup>2</sup> *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641.

mining the amount of indebtedness at any time county warrants are to be taken into the account, all those which increase the indebtedness beyond the amount limited being void; that the county authorities as well as the parties dealing with them are bound to take notice of the limit prescribed in the Constitution;<sup>1</sup> and that the limitation includes debts incurred by operation of law as well as those arising upon express contracts, but does not include involuntary liability arising *ex delicto*.<sup>2</sup>

§ 135 (88). **Constitutional Provisions construed.**—The Constitution of Iowa contains the provision that “no county or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding five per cent on the value of the taxable property within such county or corporation, to be ascertained by the last State and county list, previous to the incurring of such indebtedness.” Under this provision, as construed by the Supreme Court of the State, no indebtedness, for whatever purpose created, is exempted from the operation of the prohibition, and it applies to negotiable bonds issued under legislative authority as well as to other debts; and the creditor or bondholder must at his peril take notice that the constitutional limit is not exceeded.<sup>3</sup> Substantially similar provisions in other Constitutions, referred to in the note, have received a like construction.<sup>4</sup> If a municipal corporation *has the means in its treas-*

<sup>1</sup> *People v. May*, 9 Col. 81 (1885). The Supreme Court of the United States has recently construed this provision of the *Colorado* Constitution. *Lake County v. Rollins*, 130 U. S. 662 (1889) (county warrants); *Lake County v. Graham*, 130 U. S. 674 (1889) (county bonds). These cases are more fully considered, *post*, ch. xiv.

<sup>2</sup> *People v. May*, 9 Col. 404 (1886). *Infra*, sec. 137.

<sup>3</sup> *Bank v. School District*, 39 Iowa, 490; *French v. Burlington*, 42 Iowa, 614 (1876); *Grant v. Davenport*, 36 Iowa, 396 (1873); *McPherson v. Foster*, 43 Iowa, 48 (1876); *Council Bluffs v. Stewart*, 51 Iowa, 385. The fact that the corporation received the value of its bonds, and that the purchaser acted in good faith, and without notice, does not entitle him to recover the amount paid therefor. Since, in the view of the court, the receipt of value for the bonds does not create a

*debt*, whether the identical money received for the bonds could be recovered of the municipality, the court left undecided. *Ib.* See *ante*, secs. 124, note, 126. In *Mosher v. School District*, 44 Iowa, 122 (1876), the doctrine of the preceding cases was adhered to, and the attempt of the legislature to give a remedy was held to be ineffectual. A contract for building a sewer, by which the contractor was to receive certificates of assessments upon owners of adjacent property in full payment, held not to create a debt within the meaning of the constitutional limitation. *Davis v. Des Moines*, 71 Iowa, 500.

<sup>4</sup> The courts of *Indiana* have decided that a constitutional provision similar to that of Iowa is *prospective in its operation*, and does not prevent the issue of new bonds bearing interest for the purpose of funding debts and interest in existence when the constitutional amendment was

ury to meet its indebtedness, the issue of warrants to an amount larger than five per cent of its taxable property is not a violation of the section of the State Constitution which provides that "no municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount exceeding five per cent of the taxable property within the corporation." In such case it would not become indebted within the meaning of the constitutional clause.<sup>1</sup>

adopted. *Powell v. City of Madison*, 107 Ind. 106.

Under a constitutional provision in *Pennsylvania*, similar to that in *Iowa*, *municipal bonds* (as to which see more fully, *post*, chap. xiv. on Contracts) issued in violation of the provision were held void in the hands of *bona fide* holders. *Millerstown v. Frederick*, 114 Pa. St. 435; see also appeal of *Wilkes-Barre*, 109 Pa. St. 554. The Constitution of *Georgia* contains a like provision. *Butts v. Little*, 68 Ga. 272; *Walsh v. Augusta*, 67 Ga. 293; *Hudson v. Marietta*, 64 Ga. 286; *Spann v. Webster County*, 64 Ga. 498. Construction of like provision of Constitution of *Texas*, *Gould v. Paris*, 68 Tex. 511; *Waxahatchie v. Brown*, 67 Tex. 519.

<sup>1</sup> *Dively v. Cedar Falls*, 27 Iowa, 227 (1869). A contract by the corporation to pay for work when it shall be performed in the future, does not constitute an indebtedness, within the meaning of this provision of the Constitution, until the performance of the work. *Id.* *Valparaiso v. Gardner*, 97 Ind. 1. But *quære*. See *Davenport, &c. Gas Co. v. Davenport*, 18 Iowa, 229. *Supra*, sec. 134, and note. The meaning and effect of the *Iowa* Constitution quoted above were much discussed before the Supreme Court of *Iowa*, in which the question was, "Is a city corporation liable to a *bona fide* holder, upon its negotiable bonds issued for value, when at the time of such issue the city was indebted to the full extent of the constitutional limit?" The cause was settled before being decided, and no opinions were filed; but the judges differed in their judgment. In the *Western Jurist* (Vol. VI. p. 1, January, 1872) will be found two able and interesting articles upon the question above stated, containing the arguments upon both sides of it,

— the one being prepared, as it is understood, by Mr. Justice *Beck*, and the other by Mr. Justice *Cole*, of the Supreme Court of *Iowa*. The proposition upon which they differ is whether the power given to a city to issue its bonds absolutely ceases, as to innocent holders, the moment the constitutional limit is reached, the same as if it had never been conferred. Subsequently the Supreme Court of the State decided that bonds issued in excess of the constitutional limit were void in the hands of innocent holders for value; and denies any liability on the part of the municipality, either on the bonds or in respect of the value it received for them. *McPherson v. Foster*, 43 Iowa, 48 (1876). The subject is further discussed in chap. xiv. *post*, on Contracts. *Ante*, secs. 126, note, 130, note.

The provision of the *Iowa* Constitution, above quoted, was expounded in the case of *Grant v. Davenport*, 36 Iowa, 396 (1873), which involved the validity of a contract by the city to supply itself with water; and it was held that where a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally levy, and in good faith intends to levy therefor, such contract does not constitute "the incurring of indebtedness" within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts.

An ordinance authorizing a corporation to construct water-works within a city upon certain conditions prescribed, and providing that the city may, whenever its financial condition will permit, purchase and control them, is not an "incurring of indebtedness" within the constitutional provision; it is only assuming an obligation,

§ 136. **Constitutional Provisions construed.**— Under the constitutional provision in Illinois (quoted in the note<sup>1</sup>) the Supreme Court of the State has established the doctrine that a corporation is *prohibited* from becoming indebted in any manner or for any purpose beyond the limit,<sup>2</sup> even for *necessary current expenses*.<sup>3</sup> It cannot incur corporate *indebtedness* beyond the limit in *anticipation of the collection* of taxes levied; and such indebtedness and the evidences thereof are void.<sup>4</sup> But a corporation may issue a warrant for authorized expenses drawn against taxes actually levied and to be collected for the purpose, which warrant, while not creating a debt or liability against the corporation, may yet operate as an assignment of so much of the particular taxes when collected, and such warrant may be made receivable for taxes.<sup>5</sup>

The Constitution of Indiana contains a provision substantially identical with that of Iowa and Illinois before referred to,<sup>6</sup> under

which, without further action on the part of the city, will not ripen into a debt that is thus forbidden. The city may provide a tax not exceeding five mills for the maintenance of water-works, and a sinking fund to reduce the debt thereon. The fact that, by the levy of the tax, the city may in time become the owner of the works does not render the ordinance liable to the objection that it permits the city to do indirectly what it cannot do directly, because none but legal and constitutional means are employed. *Burlington Water Co. v. Woodward*, 49 Iowa, 58. See *supra*, sec. 134, note.

The charter of the city of *Portland, Oregon*, prohibited the city from contracting an indebtedness exceeding \$50,000; and it was held by Judge *Deady* that an ordinance assuming a liability of \$350,000, to be paid in semi-annual instalments extending through twenty years, was in violation of the charter, and this, although the ordinance made provisions for the payment of such instalments as they fell due, by the levy of taxes for that purpose. *Coulson v. Portland, Deady*, 481 (1868).

As to constitutional provision requiring the legislature to restrict the power of municipalities to levy taxes, borrow money, &c., see *ante*, chap. iii. sec. 50.

<sup>1</sup> "No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any

manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness." Const. 1870, art. 9, sec. 12.

<sup>2</sup> *Springfield v. Edwards*, 84 Ill. 626.

<sup>3</sup> *Prince v. Quincy*, 105 Ill. 138; *Prince v. Quincy*, 105 Ill. 215. See *Gould v. Paris*, 68 Tex. 511.

<sup>4</sup> *Law v. People*, 87 Ill. 385; *Fuller v. Chicago*, 89 Ill. 282.

<sup>5</sup> *Fuller v. Heath*, 89 Ill. 296; *Law v. People*, 87, Ill. 385.

A debt *already in existence* at the time of the adoption of such constitutional provision, although in excess of the limit, *may*, of course, *be refunded*, and such refunding is not a violation of the Constitution. *Powell v. Madison*, 107 Ind. 106. "The fact that the property, for which the debt is contracted, is valuable, and a source of profit or revenue, does not remove or change the character of the indebtedness." *Per Miller, J.*, in *Scott v. Davenport*, 34 Iowa, 208, 213. The property in question was water-works.

<sup>6</sup> The 13th article of the Constitution of *Indiana*, adopted in 1881, ordains that, "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding two per

which it is held that a city whose indebtedness has reached the limit cannot create a further debt even for necessities.<sup>1</sup>

The Constitution of Pennsylvania provides that "The debt of any city, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein." The city of Erie made a contract with private persons for the erection of a market-house, by the terms of which the city agreed to pay for twenty-five years a rental of \$1500 per annum. A bill in equity was filed by taxpayers stating the above contract, also that the indebtedness of the city was already in excess of the seven per centum limit, and praying for an injunction to restrain the city from paying any money on the said contract. The defendant filed a general demurrer. As it did not appear upon the face of the bill that the annual revenue, after meeting the other municipal liabilities, was sufficient to meet the proposed contract liability, the court held, on the facts before it, that the contract created an indebtedness in violation of the Constitution, and granted the injunction.<sup>2</sup>

§ 136 a. **Same subject.** — Under the constitutional provisions in Iowa, Illinois, Indiana and Pennsylvania, referred to, it is held

centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount, given by such corporation, shall be void." The provisions as to the limit of municipal indebtedness in the Constitutions of Illinois and Indiana were probably copied from the Constitution of Iowa. See *Prince v. Quincy*, 105 Ill. 215; *Valparaiso v. Gardner*, 97 Ind. 1, 9.

<sup>1</sup> *Sackett v. New Albany*, 88 Ind. 473. This case was substantially like *Prince v. Quincy*, 105 Ill. 138, and *Prince v. Quincy*, 105 Ill. 215, and the decision was the same. See also *Valparaiso v. Gardner*, 97 Ind. 1.

<sup>2</sup> *Appeal of City of Erie*, 91 Pa. St. 398. In giving the opinion of the court *Gordon, J.*, quotes the following from *Grant v. Davenport*, 36 Iowa, 896: "When a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good

faith intends to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts." And adds: "This, we hesitate not to say, is a sound constitutional interpretation, and in a similar case might well be adopted in the construction of our own Constitution. If the contracts and engagements of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them, however great the indebtedness of such municipalities may be; for in such case their engagements do not extend beyond their present means of payment, and so no debt is created." So a contract entered into by a city for the building of a sewer, whereby the contractor agrees to accept, in full satisfaction for the whole work, certificates of assessment made upon the property adjacent to the sewer, *held* not to create a debt against the city, and so not to be within the constitutional prohibition. *Davis v. Des Moines*, 71 Iowa, 500.

that a corporation may make a contract (at least for necessities) covering a series of years, upon which an obligation to pay may arise from year to year as the thing contracted for is furnished; and in such case, *the whole amount* which may ultimately become due *does not constitute a debt* within the constitutional prohibition. But in order to ascertain whether the corporation by such contract is transgressing the limit, regard is had only to the amount which may fall due within a certain year or other period; and if the revenues for that year or other period are sufficient, over and above the payment of the other expenses, to pay such amount, there is no debt incurred within the constitutional prohibition.<sup>1</sup>

§ 136 b. **City Stock in Sinking-Fund not a Debt.**—The Constitution of New York (sec. 11, art. 8) was in 1884 amended, *inter alia*, by ordaining that “No county containing a city of over one hundred thousand inhabitants, or any such city, shall be allowed to become indebted for any purpose or in any manner to an amount which, including existing indebtedness, shall exceed ten per centum

<sup>1</sup> Grant v. Davenport, 36 Iowa, 396 (water supply); E. St. Louis v. E. St. Louis, &c. Co., 98 Ill. 415 (gas supply); Valparaiso v. Gardner, 97 Ind. 1 (water supply); Appeal of City of Erie, 91 Pa. St. 398, *semble* (city market-house).

Compare Coulson v. Portland, Deady, 481, where the debt was for a railroad subsidy, and it seems there would have been an *absolute debt* for the whole amount *immediately*, though payable *in futuro*.

In Jacksonville Ry. Co. v. City of Jacksonville, 114 Ill. 562 (1885), an assessment had been made by the municipal authorities, pursuant to statute, against the property of the railway company for its ratable portion of the estimated cost of a pavement, the construction of which was proposed and authorized. The municipal ordinance which authorized the construction and assessment contained a provision that the part of the cost of the pavement that would fall on the city should be raised by general taxation. In a proceeding to review the validity of the assessment, the railway company offered to show that the city was already indebted in excess of the constitutional limit. The court held that as the ordinance did not create a debt it did not violate the constitutional provision. See *supra*, sec. 130, note; Wallace

v. San Jose, 29 Cal. 180; Niles v. Niles, 11 Am. & Eng. Corp. Cases, 299.

A statute in *Nebraska* provided that “it shall not be lawful for any warrants to be issued for any amount exceeding in the aggregate the amount levied by tax for the current year.” The county commissioners after the exhaustion of the levy allowed claims against the county, and levied a tax under the name of a “sinking-fund tax” for their payment. The tax was held illegal, because under the legislation of the State a sinking-fund tax is authorized only in the case of *loans*, and an audited claim is not a loan. U. P. R. R. Co. v. Buffalo County, 9 Neb. 449.

A city council in *Ohio* was authorized to levy not to exceed fifteen mills on the dollar for all municipal purposes. It first levied for fifteen mills, and later made an additional levy of two mills for the same year. The additional levy of two mills was held void. In 1874 the same city council had authority to make the same levy as in 1871. It first levied ten and five-tenths mills, and later made an additional levy of sixteen mills. The additional levy of sixteen mills was held *void throughout*. Cummings v. Fitch, 40 Ohio St. 56.

of the assessed valuation of the real estate of such county or city subject to taxation, as it appeared by the assessment rolls of the said county or city on the last assessment for State or county taxes prior to the incurring of such indebtedness; and all indebtedness in excess of such limitation, except such as may now exist, shall be absolutely void, except as herein otherwise provided. No such county or such city whose present indebtedness exceeds ten per centum of the assessed valuation of its real estate subject to taxation shall be allowed to become indebted in any further amount until such indebtedness shall be reduced within such limit." Construing this provision, it was held by the Court of Appeals that "*city stock*" of the city of New York held by the Commissioners of the Sinking Fund for that city is not an indebtedness of the city within the meaning of the constitutional provision, since such city stocks are not debts which the municipality can be called upon to pay, and that the indebtedness referred to in the Constitution is an indebtedness to be met in the future by taxation.<sup>1</sup>

§ 137 (89). **Liabilities ex delicto.** — *A restrictive provision in a city charter, that the "council shall not create or permit to accrue any debts or liabilities which shall exceed" a specified sum, unless a certain course be pursued by the council and approved by a vote of the people, has been considered to have no relation to liabilities arising ex delicto, or to those which the law may cast upon the corporation, and to apply at most only to contracts or liabilities voluntarily created. The court, indeed, seems to consider the provision as directory simply, and not as a limitation on the power of the council to create debts.*<sup>2</sup> The provision in the Constitution of Iowa referred to in a preceding section, although it is construed by the Supreme Court of the State to fix an absolute limit to the amount of indebtedness which a municipality has the power to incur,<sup>3</sup> is by

<sup>1</sup> Bank for Savings v. Grace, Mayor, &c. of New York, 102 N. Y. 313. After referring to the constitutional amendment and reviewing the legislation respecting the sinking fund of the city of New York, the court said: "This construction cannot lead to a diversion of the sinking fund, but to the accomplishment of its object. It satisfies also the intent of the constitutional prohibition. That is aimed at an actual, not a theoretical indebtedness, — at a substantial liability which can be discharged only by the enforcement of a tax or an assessment which, when levied, will be a

charge upon the taxpayer and a burden for him to remove; not a formal obligation which may remain as evidence of a once existing debt, but which can in no way be regarded as a present debt to be enforced, and which, if not before cancelled in the discretion of the commissioners, becomes waste paper by the mere efflux of time."

<sup>2</sup> McCracken v. San Francisco, 16 Cal. 591 (1860); *supra*, sec. 134 a.

<sup>3</sup> French v. Burlington, 42 Iowa, 614 (1876); *supra*, sec. 135.

the same court held to have no application to *liabilities arising in tort*; and it is, therefore, no defence in an action against the municipality for damages caused by a defective street or sidewalk that it was indebted at the time of the accident up to or beyond the constitutional limit.<sup>1</sup>

§ 138. (90). **Limitation on State Indebtedness.** — Constitutional limitations on *State indebtedness* apply to the State alone, and not to her political and municipal subdivisions.<sup>2</sup> A legislative provision prohibiting the *city authorities* from incurring an indebtedness beyond a designated amount does not apply to the legislature of the State; and the latter may, of course, by a subsequent act, authorize an increase of the amount.<sup>3</sup>

§ 139 (91). **Rewards for Apprehension of Offenders.** — The *governing body* of a municipal corporation (which has express power to protect the property and promote the welfare of its inhabitants) may, it has been held, offer a reward for the detection of offenders against the *general safety of its people*, as, for example, those guilty of the crime of arson within the corporate limits.<sup>4</sup> The contrary doctrine has also been held.<sup>5</sup> If the reward be offered by the mayor of a

<sup>1</sup> *Bartle v. Des Moines*, 38 Iowa, 414 (1874); *Rice v. Des Moines*, 40 Iowa, 638 (1875); *supra*, sec. 134 a.

<sup>2</sup> *Pattison v. Supervisors*, 13 Cal. 175 (1869); *Cass v. Dillon*, 2 Ohio St. 607 (1853); *Slack v. Railroad Co.*, 13 B. Mon. 16; *Clark v. Janesville*, 10 Wis. 136; *Prettyman v. Supervisors*, 19 Ill. 406. A constitutional provision that "the State shall never be a party to carrying on any works of internal improvement" does not disable the legislature from authorizing municipalities and counties to subscribe for the stock of railway companies and issue their bonds to pay therefor. *Comm'r's v. Miller*, 7 Kan. 479 (1871); s. c. 12 Am. Rep. 425. See *People v. Supervisors*, 16 Mich. 254, and Mr. Justice *Lowe's* individual opinion — not the court's — in *State v. County of Wapello*, 13 Iowa, 388, 418-422; *Dubuque County v. Railroad Co.*, 4 G. Greene (Iowa), 1; *Dean v. Madison*, 7 Wis. 688.

<sup>3</sup> *Amey v. Allegheny City*, 24 How. (U. S.) 364 (1860). Construction of particular limitation. *Id.* See, on the general subject, *Wallace v. Mayor*, 29 Cal.

180; *Wyncoop v. Society*, 10 Iowa, 185; *Rice v. Keokuk*, 15 Iowa, 579; *Gibbon v. Railroad Co.*, 36 Ala. 410; *Foot v. Salem*, 14 Allen, 487; *Dunnovan v. Green*, 57 Ill. 63.

<sup>4</sup> *York v. Forscht*, 23 Pa. St. 391 (1854); *Crawshaw v. Roxbury*, 7 Gray, 374 (1856). An offer of a reward is revocable at any time before its terms have been complied with, and may be revoked in the same manner in which it was made, yet it is immaterial that the claimant of the reward was ignorant of its withdrawal. *Shuey v. United States*, 92 U. S. 73 (1875). Such an offer is not void for ambiguity, and entitles a person to the reward who gives information to the police officers of the city upon which the incendiary is arrested, he being afterwards convicted.

<sup>5</sup> The power of towns in *Maine* to offer rewards denied. *Gale v. South Berwick*, 51 Me. 174. See *Lee v. Flemingsburg*, 7 Dana, 59, and *Loveland v. Detroit*, 41 Mich. 367. In *Iowa* it is held that "in the absence of express statutory authority a city has no power to offer a reward for



city which has such power, it may be ratified by the city council subsequently, and is binding upon the city, though not so ratified until after the performance of the service for which the reward is claimed.<sup>1</sup> A promise to reward an officer for doing that which, without such reward, it was his duty to do, is void. Such a promise is, on general principles, *without consideration*, if, indeed, it be not illegal.<sup>2</sup> Therefore, a watchman of a city, who, while in the discharge of his duty as such, discovers a person in the act of committing a crime, cannot recover from the city a reward offered by it.<sup>3</sup>

§ 140 (92). **Public Buildings.**—Power to the officers, or to one of the departments of a municipal corporation, to provide for repairs to public buildings, does not give authority to erect a new building,

the apprehension of criminals, such power not being included in the general authority given to the city council to pass ordinances for the preservation of peace and good order in the city." *Hawk v. Marion Co.*, 48 Iowa, 472; *Hanger v. Des Moines*, 52 Iowa, 193; s. c. 9 C. L. J. 478. So in *Kentucky*. *Patton v. Stephens*, 14 Bush (Ky.), 324, where the court says, "The power to pass all needful by-laws and ordinances for the due and effectual administration of justice in said city," and to "legislate upon all subjects which the good government of said city shall require," does not authorize an appropriation of money to enforce laws of the Commonwealth, wherein every other community thereof has the same interest. In *New Hampshire* the power to offer rewards for offenders is conferred upon towns by statute. It is there held that, under the statute, a reward cannot be claimed for services rendered before it is offered. *Abel v. Pembroke*, 61 N. H. 357. The Constitution of *Florida* authorizes the imposition of taxes for "corporation purposes and for no other purpose," and the courts there hold that cities are not liable to pay rewards offered for the detection and punishment of criminals. *Murphy v. Jacksonville*, 18 Fla. 318. A county in *Indiana* has no such power. *Board of Commissioners v. Bradford*, 72 Ind. 455.

<sup>1</sup> *Crawshaw v. Roxbury*, *supra*. Under a statute authorizing the mayor and city council of any city, or the selectmen of

any town, to offer and pay from the treasury of such city or town a suitable reward, not exceeding \$300, for apprehending and securing a person charged with a capital or other high crime, any city or town may be bound by an offer of a reward in such cases; and any person who performs the service, relying upon such offer, may, in action of *assumpsit*, recover the amount offered of such city or town. *Janvrin v. Exeter*, 48 N. H. 83. If two persons jointly perform the service they must be joined as plaintiffs. *Id.* Requisites of declaration where reward is offered by a town, see *Codding v. Mansfield*, 7 Gray, 272. In order to recover the reward the plaintiff must in general prove performance according to the terms of the advertisement. See *Neville v. Kelly*, 12 C. B. n. s. 740; *Smith v. Moore*, 1 C. B. 438; *Thatcher v. England*, 3 C. B. 254; *England v. Davidson*, 11 A. & E. 856; *Lancaster v. Walsh*, 4 M. & W. 16; *Fallick v. Barber*, 1 M. & S. 108; *Williams v. Carwardine*, 4 B. & Ad. 621; *Tarner v. Walker*, L. R. 1 Q. B. 641; s. c. L. R. 2 Q. B. 301.

<sup>2</sup> *Stotesbury v. Smith*, 2 Burr. 924; *Harris v. Watson*, Peake, 72; 3 Kent Com. 185; *Stilk v. Myrick*, 2 Campb. 317; *Bridge v. Cage*, Cro. Jac. 103. See chapter on Corporate Officers, *post*, secs. 233, 234.

<sup>3</sup> *Pool v. Boston*, 5 Cush. 219 (1849); *Gilmore v. Lewis*, 12 Ohio, 281; *Means v. Hendershott*, 24 Iowa, 78; chap. ix. *post*.

and certainly not a large and expensive edifice.<sup>1</sup> But power to a municipal corporation to build or repair carries with it the right to determine plan and mode.<sup>2</sup>

<sup>1</sup> *Peterson v. Mayor, &c.*, 17 N. Y. 449, 455, *per Denio*, J. Contract between city and county in respect to public buildings. *Bergen v. Clarkson*, 1 Halst. (N. J.) 352 (1796); *De Witt v. San Francisco*, 2 Cal. 289 (1852). In *Georgia* it has been held that the power to build a school-house is within the scope of the general power of a municipal corporation in that State, without express authority, unless the charter forbids. *Cartersville v. Baker*, 73 Ga. 686.

<sup>2</sup> *Ely v. Rochester*, 26 Barb. 133; *Bell v. Platteville*, 71 Wis. 139. An unrestricted power to purchase real estate for the erection of public buildings held to give, by implication, the exclusive right to the City Council to determine the expediency of purchasing, the power to purchase on credit and to issue bonds for the purchase money. *Richmond v. McGirr*, 78 Ind. 192 (1881); *ante*, secs. 119, 124, 125. As to power to build *town-house*. *French v. Quiney*, 3 Allen, 9. Incidental power to provide suitable accommodations for the transaction of the business of the corporation. *People v. Harris*, 4 Cal. 9; see *Vanover v. Davis*, 27 Ga. 354; chapter on Corporate Property, *post*. In *Callam v. Saginaw*, 50 Mich. 7, a taxpayer filed a bill for an injunction to restrain the issue of bonds of the city of Saginaw to pay for the erection of a court-house for the county at the sole expense of a city, under an act authorizing such action. The court, *Campbell, J.*, said: "It is claimed, and is true, that the legislature cannot compel a city to bear the whole expense of county buildings (see *ante*, secs. 72, 73). . . . The question therefore arises whether a city can be authorized to raise by corporate funds and taxes the entire money required for a court-house for the county. . . . No precedents have been found precisely analogous. The power is rested by the defence on the validity of city expenditures for purposes of a public character which make a city more desirable as a residence, promote its improvement and the increase of its taxable property, and add to the comforts or prosperity of its

inhabitants. . . . There is no lack of authority for allowing municipal corporations to aid, or in some cases to establish, improvements which are not purely for municipal purposes. . . . It is also very common both in this country and in England, from which we have drawn the principles of our common law, for cities, in building their municipal buildings, to furnish accommodations, gratuitously or otherwise, for public officers and bodies which do not represent the city. . . . The question whether the city of Saginaw, which must, at the present ratio of taxation, bear about one-fifth of the expense of a court-house, may be authorized to raise money enough to build the whole of it, does not therefore seem to be so much whether it can raise anything more than its ratable proportion for what is not strictly a municipal purpose, but how much it can raise without violating principle. It seems to us that if the door can be opened at all, this is not a matter for the courts to decide. The legislature cannot compel a city to be generous to the State or county; but we do not think the Constitution forbids a city—if authorized by statute—from determining for itself whether such an investment of city money for purposes in which the city is directly concerned in part, will not be wise and profitable. If it may put up handsome instead of mean buildings for its own uses, and may accommodate the county in those buildings upon as easy terms as it chooses, we do not see that what is now proposed involves substantially any very different principle." The action of the court below in dismissing the bill was, however, reversed on other grounds.

Council have power to fit up and furnish the room in which they meet, and the court refused to enjoin them from furnishing the council chamber with portraits of the governors of the State. *Reynolds v. Mayor of Albany*, 8 Barb. 597; *People v. Harris*, 4 Cal. 9; but see *Hodges v. Buffalo*, 2 Denio, 110; *Stetson v. Kempton*, 13 Mass. 272 (1816), *per Parker, C. J.* *Proper uses of public build-*

§ 141 (93). **Police Powers and Regulations.** — Many of the powers exercised by municipalities fall within what is known as the *police power* of the State,<sup>1</sup> and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the

ings. *Scofield v. School District*, 27 Conn. 499; *French v. Quincy*, 3 Allen, 9. *Market Houses*, *post*, secs. 380-385, 562, 648. Equity will not interfere to prevent the erection of suitable public buildings unless the provisions of the charter forbid. *Torrent v. Muskegon*, 47 Mich. 115.

In organizing a county the legislature may delegate the authority to locate the county seat to the county commissioners. *Rice v. Shuey*, 5 N. W. R. 435. But the county seat cannot be changed at the will of the county board after they have canvassed the vote and located it in accordance with the result. *People v. Benzie Co.*, 41 Mich. 6; *Attorney-General v. Lake Co.*, 33 Mich. 289; *Attorney-General v. Benzie*, 34 Mich. 211.

<sup>1</sup> *Ante*, chap. iv. The power of a corporation to exercise *police jurisdiction* is a power delegated by the State. *Cranston v. Augusta*, 61 Ga. 572. The police power of a State is not impaired by the Fourteenth Amendment to the Constitution of the United States. *Barbier v. Connolly*, 113 U. S. 27 (1885). Ordinance of San Francisco prohibiting washing and ironing in public laundries within a specified district, from ten o'clock at night to six in the morning held valid under the police power. *s. p.* *Soon Hing v. Crowley*, 113 U. S. 703 (1885). See full discussion in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661 (1885); *Butchers' Union Co. v. Crescent City, &c. Co.*, 111 U. S. 746 (1883) (Slaughter-house case).

An act prohibiting the *manufacture and sale of oleomargarine* or keeping the same with intent to sell, is valid as a legitimate exercise of the police power of the State, and is not in conflict with the Fourteenth Amendment of the Federal Constitution. *Powell v. Commonwealth*, 114 Pa. St. 265 (1886). Affirmed by Supreme Court of the United States, 127 U. S. 678 (1888); *s. p.* *State v. Addington*, 77 Mo. 110 (1882). *Contra*: *People v. Marx*, 99 N. Y. 377. See, also, *Matter of Jacobs*,

98 N. Y. 98 (1885) (prohibiting manufacture of cigars in tenement houses); and the views of Mr. Justice Field in *Munn v. Illinois*, 94 U. S. 113, 142 (1876), and in *Powell v. Pennsylvania*, 127 U. S. 687. We cannot refrain from expressing our full concurrence in the views and conclusions of the Court of Appeals of New York in *The People v. Marx*, *supra*. It will not escape observation that the Court of Appeals of New York and the Supreme Court of Pennsylvania reached opposite conclusions on a question relating so vitally to the natural, inalienable, and primordial rights of the citizen. The judgment of the Supreme Court of Pennsylvania sustaining the Act of 1885, was affirmed by the Supreme Court of the United States; and on like grounds, if the New York statute (which was in judgment in the case of *The People v. Marx*) had been before the Supreme Court of the United States, its validity would have been upheld, unless the Supreme Court had followed the judgment of the Court of Appeals. We have, at all events, that which is regarded as a fundamental right in New York considered not to be such in Pennsylvania. The Pennsylvania Act of 1885, under which Powell was convicted, makes the manufacture and sale of oleomargarine, though open and unconcealed, a crime. We cannot but express our regret that the Constitution of any of the States, or that of the United States, admits of a construction that it is competent for a State legislature to suppress (instead of regulating) under fine and imprisonment the business of manufacturing and selling a harmless, and even wholesome, article, if the legislature chooses to affirm, contrary to the fact, that the public health or public policy requires such suppression. The record of the conviction of Powell for selling without any deception a healthful and nutritious article of food makes one's blood tingle.

use and storing of dangerous articles, to establish and control markets, and the like. These and other similar topics will be considered in appropriate places. But it may here be observed that every citizen holds his property subject to the proper exercise of this power, either by the State legislature directly, or by public or municipal corporations to which the legislature may delegate it.<sup>1</sup> Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled, "Police Laws or Regulations." It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not unreasonably to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally. These regulations rest upon the maxim, *Salus populi suprema est lex*. This power to restrain a private injurious use of property, is essentially different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner, contrary to the maxim, *Sic utere tuo ut alienum non lædas*.<sup>2</sup>

<sup>1</sup> McKibbin v. Fort Smith, 35 Ark. 352; Textor v. Baltimore & O. R. R. Co., 59 Md. 63 (gates at railroad crossings).

<sup>2</sup> Baker v. Boston, 12 Pick. 184 (1831) (as to nuisances); Wadleigh v. Gillman, 12 Me. 403 (as to wooden buildings); Vanderbilt v. Adams, 7 Cow. 349 (as to harbor regulations, where the general principle upon which police laws rest is very satisfactorily discussed by Woodworth, J.); Commonwealth v. Alger, 7 Cush. 53, 84 (valuable opinion by Shaw, C. J.); Fisher v. McGirr, 1 Gray, 1; Commonwealth v. Tewksbury, 11 Met. 55; Salem v. Eastern Railroad, 98 Mass. 431; Watertown v. Mayo, 109 Mass. 315; Dingley v.

Boston, 100 Mass. 544; Cobb v. Boston, 112 Mass. 181; Bancroft v. Cambridge, 126 Mass. 438; Welch v. Boston, 126 Mass. 442; Little Rock v. Barton, 33 Ark. 436, citing and approving text. Hollingsworth v. Parish of Tensas, 17 Fed. Rep. 109; Coates v. Mayor, &c. of New York, 7 Cow. 585 (1826) (as to ordinance prohibiting the interment of the dead within the city); Goszler v. Georgetown, 6 Wheat. 593 (as to power to grade).

The power to regulate the *keeping of dogs* and to enforce such regulations by forfeitures, fines, and penalties is recognized as one within the police power. City of Faribault v. Wilson, 34 Minn. 254.

§ 142. **Subject to Federal Constitution.** — All-embracing and penetrating as the police power of the State is, and of necessity must be, *it is nevertheless subject, like all other legislative powers, to the*

The legislature may, it seems, pass an act *limiting the height of dwelling-houses* in cities. The New York act of 1885 construed not to extend to buildings designed for hotels. *People v. D'Oench*, 111 N. Y. 359 (1888).

In the case of the Boston Beer Co. v. Massachusetts, 97 U. S. 25 (1877), Mr. Justice *Bradley*, speaking for the court, said: "Whatever differences of opinion may exist as to the *extent and boundaries of the police power*, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." See also *New Orleans Gas Co. v. Louisiana Light Co.* 115 U. S. 650, 661 (1885). *Prohibitory liquor laws valid.* *Bartemeyer v. Iowa*, 18 Wall. 129 (1873); *Foster v. Kansas*, 112 U. S. 201 (1884); *Kidd v. Pearson*, 128 U. S. 1 (1888); *Mugler v. Kansas*, 123 U. S. 623 (1887); *Bowman v. Railway Co.*, 125 U. S. 465 (1888), sustaining a statute of a State prohibiting common carriers from bringing intoxicating liquors into the State without first having a certificate from the county auditor that the consignee is authorized to sell in the county. See also *Fertilizing Co. v. Hyde Park* (village of), 97 U. S. 659 (1878). In the last case Mr. Justice *Swayne* says: "Perhaps the most striking application of the police power is in the destruction of buildings to prevent the spread of a conflagration. This right existed by the common law, and the owner was entitled to no compensation." 2 Kent's Com. 339 (marg. paging), and notes 1 and a and b." *Post*, chap. xxiii.

It is within the police power of the State to authorize the *channel of a river* to be turned or straightened, in order to protect from threatened inundation a populous portion of the State; and such work is of a public character. *Green v. Swift*, 47 Cal. 536 (1874). In such case, the authority of the State is none the less in degree, even if the inhabitants of the district

to be protected did not constitute a body politic. *Id.* A power "to make and establish rules for the regulation of jut or bay windows" does not authorize the council to pass an ordinance granting permission to an *individual* to construct a bay window projecting beyond the building line. *Reimer's Appeal*, 100 Pa. St. 182. See *post*, secs. 660, 734.

Speaking of *turnpike acts, paving acts, &c.*, Lord *Kenyon*, in the case of the Governor &c. v. Meredith, 4 Term Rep. 790, 796, says: "Some individuals suffer an inconvenience under all these acts of parliament; but the interests of individuals must give way to the accommodation of the public." And *per Buller, J.*, in the same case: "There are many cases in which individuals sustain an injury, for which the law gives no action; for instance, pulling down houses, or raising bulwarks, for the preservation and defence of the kingdom against the king's enemies." But "the law will not allow the right of property to be invaded under the *guise of a police regulation* for the preservation of health, when it is manifest that such is not the object and purpose of the regulation." *Per Wilde, J.*, in *Austin v. Murray*, 16 Pick. 126; *Green v. Savannah*, 6 Ga. 1 (1849); *People v. Hawley*, 3 Mich. 330; *Ames v. P. H. L. Co.*, 11 Mich. 139. The extent of the police power will be further discussed in the chapter on Ordinances, *post*. See also *Cooley*, Const. Lim. 572-594. How far and when cities, in executing police duties, are *agents of the State*, and not of the municipality. See *Buttrick v. Lowell*, 1 Allen (Mass.), 172; *Mitchell v. Rockland*, 51 Me. 118, 122; 52 Me. 118; *Brown v. Vinalhaven*, 65 Me. 402 (1876); *Keller v. Corpus Christi*, 50 Tex. 614, approving text; *State v. St. Louis Court*, 34 Mo. 546; *White v. Kent*, 11 Ohio St. 550; *Thomas v. Ashland*, 12 Ohio St. 127; *City Council v. Payne*, 2 Nott & McCord (S. C.), 475; *People v. Hurlbut*, 24 Mich. 44 (1871); s. c. 9 Am. Rep. 103; *ante*, sec. 60; *post*, secs. 253, 393, 396, 768.

*paramount authority of the State and Federal Constitutions.* A right conferred or protected by the Constitution cannot be overthrown or impaired by any authority derived from the police power. Thus the police power of the State must be exercised in subordination to the Federal Constitution, and, as was held by the Supreme Court of the United States, in respect of State laws forbidding the *transportation of Texas cattle*, it cannot extend to *interstate* transportation of the subjects of commerce.<sup>1</sup> In a subsequent case<sup>2</sup> the rights claimed by a private corporation, chartered by an act of the legislature, and authorized by its charter to establish and carry on a business which was intrinsically and unavoidably a nuisance to the inhabitants in the neighborhood,<sup>3</sup> came in conflict with the police power of the State, subsequently delegated to a municipality within whose limits the offensive and unhealthy business of the private corporation was conducted. The subject was thoroughly considered. The court did not deny that by a specific contract the legislature might surrender for a limited period the right to interfere with a business which was a positive nuisance. On the ground, however, that the private corporation, when its charter was tested by the principles of strict construction applicable to such grants,<sup>4</sup> had no specific legislative authority to maintain its works

<sup>1</sup> *Railroad Co. v. Husen*, 95 U. S. 465 (1877). In *Kimmish v. Ball*, 129 U. S. 217 (1889), an Iowa statute making persons having "Texas cattle" in their possession which have not been wintered north of a certain point, liable for damages which may accrue from allowing them to run at large, and thereby spread "Texas fever," was sustained.

<sup>2</sup> *Fertilizing Co. v. Hyde Park* (village of), 97 U. S. 659 (1878).

<sup>3</sup> The Fertilizing Company obtained by its charter from the State (which was a legislative contract), for the period of fifty years, three rights, among others; first, a right to establish and maintain at a place in Cook County, south of the dividing-line between townships thirty-seven and thirty-eight, works for converting offal and animal matter; and the works had been established there at a cost of more than two hundred thousand dollars; second, they obtained the right to establish receiving depots for receiving and carrying such matter from Chicago; and third, they obtained the right to carry such matter from their receiving depots to their converting works in Hyde Park. Under legislative

authority subsequently conferred upon it the municipality of Hyde Park passed an ordinance absolutely prohibiting the transportation of offal through the village. The majority opinion sustaining the ordinance is based upon two propositions: 1. That the chartered rights of the Fertilizing Company were subject to the police power of the State, which was delegated to the municipal authorities. 2. The charter of the company is not a contract guaranteeing in the locality originally selected, exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future, by reason of the growth of population around it. Mr. Justice Miller limited his judgment to a concurrence on the second point, and denied the first. *Strong, J.*, dissented. *Feld, J.*, did not sit. Critically viewed, the case is perhaps only an authoritative decision on the second ground, since it is relied on in both concurring opinions, and is amply sufficient to sustain the judgment, which affirmed that of the Supreme Court of Illinois

<sup>4</sup> *Ante*, secs. 89-91, and cases.

on the site where they were established, if not, indeed, on the broader ground that all legislative charters to private corporations are subordinate to the police power in all cases whatsoever, or, at all events, in all cases except where it is otherwise provided by the express terms of the contract, or by what is necessarily implied, *the municipal ordinances to abate the nuisance were sustained*, although the corporation had erected expensive works, and the effect of enforcing the ordinance would be to prevent the further carrying on of the business in that locality. Similar results in favor of the police power as against alleged vested rights under charters have been reached in other cases.<sup>1</sup>

<sup>1</sup> *Coates v. Mayor, &c. of New York*, 7 Cow. 585 (1826), referred to in the case of the *Fertilizing Co. v. Hyde Park*, *supra*, and thus stated by *Swayne, J.*: In *Coates v. The Mayor, &c. of New York*, 7 Cow. 585, a law was enacted by the legislature of the State, on the 9th of March, 1813, which gave to the city government power to pass ordinances regulating, and if necessary preventing, the *interment of dead bodies within the city*; and a penalty of \$250 was authorized to be imposed for the violation of the prohibition. On the seventh of October, 1823, an ordinance was adopted forbidding interments or the depositing of dead bodies in vaults in the city south of a designated line. A penalty was prescribed for its violation. The action was brought to recover the penalty for depositing a dead body in a vault in Trinity church-yard. A plea was interposed setting forth that the *locus in quo* was granted by the King of Great Britain on the 6th of May, 1697, to a corporation by the name of the "Rector and Inhabitants of the City of New York in Communion with the Protestant Episcopal Church of England," and their successors forever, as, and for a church-yard and burying place, with the rights, fees, &c.; that immediately after the grant the land was appropriated and thenceforward was used as and for a cemetery for the interment of dead bodies; that the rector and wardens of Trinity Church were the same corporation, and that the body in question was deposited in the vault in the church-yard by the license of that corporation. A general demurrer was filed, and the case was elaborately argued. The validity of

the ordinance was sustained. The court held that "the act under which it was passed was not unconstitutional, either as impairing the obligation of contracts, or taking property for public use without compensation, but stands on the police power to make regulations in respect to nuisances." It was said: "Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity, and that it must yield to by-laws and other regular remedies for the suppression of nuisances." In such cases prescription, whatever the length of time, has no application. Every day's continuance is a new offence, and it is no justification that the party complaining came voluntarily within its reach. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy. If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it. *Brady v. Weeks*, 3 Barb. (N. Y.) 157. *Post*, sec. 372. Cemetery associations and their franchises are subject to regulation under the police power. *Cemetery Ass. v. Railroad Co.*, 121 Ill. 199 (1887). So where a city had conveyed land to individuals for the purpose of erecting powder magazines thereon, and afterwards passed an ordinance declaring the magazines so erected dangerous to life and property, and direct-

§ 143 (94). **Prevention of Fires.**—The *prevention of damage by fire* is usually an object within the scope of municipal authority either by express grant or by the power, in a chartered town or city, to make police regulations or needful by-laws. Under such power, it may establish fire limits,<sup>1</sup> prevent the erection of wooden buildings,<sup>2</sup> regulate the mode and removal of ashes,<sup>3</sup> and make any other reasonable regulations to prevent and extinguish fires. Under such power the town or municipal body is authorized to appropriate money for the purchase of engines, or for the repair thereof, if to be used for the purpose of extinguishing fires therein; and this, whether they belong to the corporation or were purchased by private subscription.<sup>4</sup> And money may also be appro-

ing them to be removed *at the expense of the owners*, it was held that the ordinance was a valid exercise of the police power, and did not impair the obligation of the contract under the deed, nor was it a taking of private property without compensation. *Davenport v. Richmond City*, 81 Va. 636 (1887). So in the case of the Boston Beer Company, where the legislature of Massachusetts, on the 1st of February, 1827, incorporated the "Boston Beer Company," "for the purpose of manufacturing malt liquors in all their varieties in the city of Boston," &c. By an act of June, 1869, the manufacture of malt liquors to be sold in Massachusetts, and brewing and keeping them for sale, were prohibited under penalties of fine and imprisonment and the forfeiture of the liquors to the Commonwealth. In *The Boston Beer Co. v. The Commonwealth*, the Supreme Court of Massachusetts held that "the act of 1869 did not impair the obligations of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals. The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the legislature." This judgment was affirmed by the Supreme Court of the United States, 97 U. S. 25.

The question whether certain requirements are a part of a system of police

regulation adapted to aid in the protection of life and health, is properly one of legislative determination, and a court should not lightly interfere with such determination, unless the legislature has manifestly transcended its province. *Daniels v. Hilgard*, 77 Ill. 640 (1875).

<sup>1</sup> *Post*, sec. 405.

<sup>2</sup> *Post*, sec. 405.

<sup>3</sup> Many fires are said to be "accidental" which are the result of neglect to keep ashes in fire-proof utensils; and yet regulations for the safe keeping of ashes are seldom made, and when made, rarely enforced. *Filbey v. Combe*, 2 M. & W. 677; *Law v. Dodd*, 1 Ex. 845; *Lyndon v. Stadbridge*, 2 H. & N. 45. See further, *The Queen v. Wood*, 5 E. & B. 49; *Guardians of Holborn Union v. Vestry of St. Leonard, Shoreditch*, L. R. 2 Q. B. Div. 145; *Gay v. Cadby*, L. R. 2 C. P. Div. 391; *Harrison's Munic. Manual*, 4th ed.; *Clark v. South Bend*, 85 Ind. 276 (ordinance regulating the *storage of straw*).

<sup>4</sup> *Allen v. Taunton*, 19 Pick. 485 (1837). *Hunneman v. Fire District*, 37 Vt. 40; *Robinson v. St. Louis*, 28 Mo. 488 (repair of engine-house); *Wadleigh v. Gillman*, 12 Me. 403; *Vanderbilt v. Adams*, 7 Cow. 349, 352; *post*, secs. 405, 572 n., 690, chap. xxiii. Text approved. *Green v. Cape May*, 41 N. J. L. 45. A town possesses implied power, in the absence of express legislative enactment, to purchase fire-engines. *Bluffton v. Studabaker*, 106 Ind. 129; *Carleton v. Washington*, 38 Kan. 726; *Bridgford v. Tusculumbia*, 16 Fed. Rep. 910.



priated for the benefit of engine and hook and ladder companies therein.<sup>1</sup>

§ 144 (95). **Quarantine and Health; Scope of Power to preserve the Public Health.** — The *preservation of the public health and safety* is often made in express terms a matter of municipal duty, and it is competent for the legislature to delegate to municipalities the power to regulate, restrain, and even suppress, particular kinds of business, if deemed necessary for the public good.<sup>2</sup> The subject will be considered more in detail in the chapter on Ordinances.<sup>3</sup> The general nature and scope of the authority, as it is not unfrequently bestowed, are well illustrated by a case in Maryland. By its charter the city of Baltimore was vested with "full power and authority to enact *all ordinances necessary to preserve the health of the city, prevent and remove nuisances, and to prevent the introduction of contagious diseases within the city and within three miles of the same.*" Commenting on this provision of the charter, the Court of Appeals say: "The transfer of this salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish, within

<sup>1</sup> Van Sicklen v. Burlington, 27 Vt. (1 Wms.) 70 (1854). Approving Allen v. Taunton, *supra*. See *post*, chapter on Ordinances. Power of council over fire companies, and to appoint officers therefor. See Miller v. Savannah Fire Co., 26 Ga. 678.

The protection of all the buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants, and for their relief from a common danger; and cities and towns are therefore authorized by general law in Massachusetts to provide and maintain fire engines, reservoirs, and hydrants to supply water for the extinguishment of fires. Allen v. Taunton, 19 Pick. 485; Hardy v. Waltham, 3 Met. 163; Fisher v. Boston, 104 Mass. 87; Tainter v. Worcester, 123 Mass. 311. The question whether and where *public hydrants* should be erected is within the exclusive control of the municipal authorities, as the public interests may from time to time require; and such municipality does not assume any liability to the owners of property to furnish means of extinguishment of fires upon which an action can be maintained. Grant v. Erie, 69 Pa. 420; Wheeler v.

Cincinnati, 19 Ohio St. 19; Brinkmeyer v. Evansville, 29 Ind. 187; Fisher v. Boston, 104 Mass. 87; Hill v. Boston, 122 Mass. 344. The mere fact that a *volunteer fire association* renders services in extinguishing fires imposes no obligation upon a municipal corporation to pay its members therefor. Jacksonville v. Aetna Fire Engine Co., 20 Fla. 100. *Post*, sec. 976 and cases.

<sup>2</sup> Shrader, *In re*, 33 Cal. 279 (1867); Ashbrook v. Commonwealth, 1 Bush (Ky.), 139 (1866); Tucker v. Virginia City, 4 Nev. 20; Johnson v. Simonton, 43 Cal. 242 (1872). Aaron v. Broiles, 64 Tex. 316; *post*, chap. xxiii. The power of the State to protect the public health cannot be surrendered; but a municipality entrusted with the execution of this power may make contracts to accomplish the purpose, and while the State or the municipality may recall or modify such contracts, they cannot do so from mere caprice or to gain pecuniary advantage. Louisville v. Wible, 84 Ky. 290, where a contract giving the *exclusive right to remove dead animals* for five years was held valid.

<sup>3</sup> *Post*, secs. 369 *et seq.*, 374-378.

the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the legislative powers which the general assembly could have exercised. Of the degree of necessity for such municipal legislation, the *Mayor and City Council of Baltimore* were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributory to the end) of exercising the powers which they might deem requisite to the accomplishment of the objects of which they were made the guardians. 'To prevent the introduction of contagious diseases within the city, and within three miles of the same,' they might impose heavy penalties on the captain, owner, or consignee of any ship or other vessel entering the port of Baltimore, on board of which small-pox or other contagious diseases might prevail, or they might seek the accomplishment of their object by causing the vessel and all persons to be taken possession of and controlled until their purification and disinfection were effected, and impose on the captain, owner, or consignee, the payment or reimbursement of all the expenses incurred by such proceedings; or they might adopt, at the same time, both suggested remedies, if for the successful and faithful execution of their powers they deemed it necessary to do so."<sup>1</sup>

§ 145 (96). **Same subject. Appointment of Health Officers and their Powers.** — And it was held that, under this authority, it was competent for the city to pass an *ordinance providing for the appointment of a "health officer,"* prescribing his duties and powers;<sup>2</sup> and that the city might recover from the consignee of a vessel, and was not confined to the charterer, the expenses incurred by it in disinfecting and purifying the vessel, persons, and baggage on board of her at the time of her arrival, from the infection of the small-pox. Respecting the extent of liability, the court decided that the defendant was not entitled to an instruction that the recovery must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of the small-pox. On this point the court expressed its judgment to be that, "if the health officer" (on whom the duty of disinfecting the vessel was imposed by ordinance), in causing expenses, "acted *bona fide*, within the limits of a sound discretion, and with reasonable skill and judgment, in the discharge of his official duties, the reasonable expenses thus incurred must be paid." Concerning the power of the corporation over the persons

<sup>1</sup> *Harrison v. Baltimore*, 1 Gill (Md.), 264 (1843); *ante*, sec. 94.

<sup>2</sup> *Post*, sec. 370, and note, as to Health Officers and their powers.

on board of an infected vessel, the court was of opinion that it was competent for the health officer to be authorized by ordinance to send persons laboring under infectious disease to the hospital, and also those on board of the vessel liable to be affected by the disease, if, in his opinion, such a course be necessary to prevent the spread of disease; and the owner, master, or consignee may be liable for expenses thus incurred, if the health officer acts with reasonable skill and judgment, and exercises a sound and honest discretion.<sup>1</sup>

§ 146 (97). **Water Supply.** — A city having power to pass ordinances respecting the *police* of the place, and *to preserve health*, is authorized, as a sanitary and police regulation, to contract to procure a *supply of water*, by boring an artesian well on the public square, or otherwise, and is the judge of the mode best adapted to accomplish the object.<sup>2</sup>

§ 147 (98). **Indemnifying Officers.** — Where a municipal corporation *has no interest in the event of a suit*, or in the question involved in the case, and the judgment therein can in no way affect the corporate rights or corporate property, it cannot assume the defence of the suit, or appropriate its money to pay the judgment therein; and warrants or orders for the payment of money based upon such a consideration are void.<sup>3</sup> But such a corporation has power to

<sup>1</sup> Harrison v. Baltimore, 1 Gill (Md.), 264 (1843).

<sup>2</sup> Livingston v. Pippin, 31 Ala. 542 (1858); Indianapolis v. Indianapolis Gas Co., 66 Ind. 396, approving text; *ante*, sec. 94. As to water-works, Rome v. Cabot, 28 Ga. 50; Hale v. Houghton, 8 Mich. 458; *ante*, sec. 58; *post*, sec. 443. A municipal corporation owning lands on a water-course, distant from the city, to supply its inhabitants with water, has no right (unless acquired by purchase or by the exercise of the right of eminent domain) to divert water to the injury of other riparian proprietors. Stein v. Burden, 24 Ala. 130 (1854); Fleming's Appeal, 65 Pa. St. 444. As against the owner of the *fee* abutting on a highway the selectmen of a town have a right to drain a spring on the owner's side of such road, and dispose of the water in such mode as to protect the highway from overflow; but if they divert the water for any other purpose, they act individually, and not for the public good, and as against the

owner have no capacity to act at all. Suffield v. Hathaway, 44 Conn. 521; *ante*, sec. 30; *post*, secs. 1038-1046. Power to purchase or condemn lands for water-works. People v. McClintock, 45 Cal. 11 (1872); *post*, secs. 561, 562, 597, 610. Regulations of water supply. *Post*, sec. 320. Pipes in streets. *Post*, sec. 697. As to liability for wrongful acts of firemen, *post*, sec. 976.

<sup>3</sup> Halstead v. Mayor, &c. of N. Y., 3 Comst. (3 N. Y.) 430 (1850), affirming s. c. 5 Barb. 218, and deciding that corporate funds cannot be appropriated to pay penalties personally incurred by officers for refusing to discharge their official duties; see, in explanation, Morris v. The People, 3 Denio, 381. And see, also, People v. Lawrence, 6 Hill, 244, holding that the supervisors of a county had no right to appropriate money to defray the costs of a justice of the peace who had been prosecuted for official misconduct and acquitted; recognized in Bank v. Supervisors, 5 Denio, 517, 521. Same

indemnify its officers against liability which they may incur in the *bona fide* discharge of their duties, although the result may show that the officers have exceeded their legal authority.<sup>1</sup> Thus, it may vote to defend suits brought against its officers for acts done in good faith in the exercise of their office.<sup>2</sup> So, if a public corporation is charged with the duty of repairing highways, and is made liable for defects therein, it has the *incidental* power to indemnify an officer who digs a ditch for the purpose of raising a legal question as to the boundary line of the highway.<sup>3</sup>

§ 148 (99). **Same subject. Refund-Taxes illegally assessed. —**

So, a vote by a town to refund money paid by assessors of the town on an illegal assessment made by them of a *town* tax, is an express promise, founded upon a meritorious and legal consideration, and is irrevocably binding upon the town. And this, although without such vote the town could not have been compelled to refund or indemnify the assessors. But such a vote, by a *town*, would be without consideration in respect to *State* and *county* taxes.<sup>4</sup> So, if

principle, *Merrill v. Plainfield*, 45 N. H. 126. The trustees of a town may employ counsel to defend an action against the marshal for false imprisonment brought by a person arrested by him for violating an ordinance of the town. *Cullen v. Carthage*, 103 Ind. 196.

The common council of a city in *Connecticut*, under authority of the city charter, enacted a by-law with respect to wharves, and the anchoring, moving, and mooring of vessels in the harbor, and appointed a superintendent of wharves, to discharge the duties provided for in the by-law; the performance of his duties was not enforced by a penalty, and he acted only upon application of parties interested and at their expense. In the discharge of his duties, and while acting in good faith, he ordered a vessel lying at a wharf to be hauled astern to make more room for another at an adjoining wharf, and was sued by the owner of the wharf for damages. It was held, on the principle stated in the text, that *the city could not legally indemnify him* for the expenses incurred by him in defending against the suit, and a threatened payment of such expenses by the city was enjoined at the suit of a resident and taxpayer. *Gregory v. Bridgeport*, 41 Conn. 76, 87 (1874); s. c. 19 Am. Rep. 485, where

*Phelps, J.*, cites the text, and refers to other cases to the same point.

<sup>1</sup> *Pike v. Middleton* (indemnifying tax collector), 12 N. H. 278 (1841); *Fuller v. Groton*, 14 Gray, 340; *Sherman v. Carr* (indemnifying executive officer), 8 R. I. 431 (1867); *Briggs v. Whipple*, 6 Vt. 95 (1834); *Bancroft v. Lynnfield*, 18 Pick. 566 (1836); *Nelson v. Milford*, 7 Pick. 18, 26 (1828); *Babbitt v. Savoy*, 3 Cush. 530 (1849); *Hadsell v. Hancock*, 3 Gray, 526 (1853); *State v. Hammon-ton*, 9 Vroom (38 N. J. L.), 430 (1876); s. c. 20 Am. Rep. 404, where many of the cases are referred to by *Dixon, J.*; Text approved in *Roper v. Laurinburg*, 90 N. C. 427; *Lewis v. Rochester*, 9 C. B. (N. S.) 401; *Queen v. Litchfield*, 4 Ad. & E. (N. S.) 897; *Attorney-General v. Norwich*, 2 Mylne & Cr. 406. In *Page v. Frankford*, 9 Greenl. (Me.) 115, this was left an open question.

<sup>2</sup> *Id.* *Baker v. Windham*, 13 Me. (1 Shep.) 74 (1836); *Cullen v. Carthage*, 103 Ind. 196. See *infra*, sec. 148.

<sup>3</sup> *Bancroft v. Lynnfield*, *supra*.

<sup>4</sup> *Nelson v. Milford*, 7 Pick. 18 (1828). A separate action, on such a vote, lies against the town in favor of each assessor for his share, which does not include, however, his own tax, paid by him voluntarily. *Id.*

the town is not concerned, having nothing to lose or gain in the result of the litigation, a vote to indemnify an officer would be in excess of its power, and void;<sup>1</sup> but it would be otherwise if the suit against the officer was in respect to matters in which the corporation was interested.<sup>2</sup>

§ 149 (100). **Furnishing Entertainments.** — Without express power, a public corporation cannot make a contract to provide for celebrating *the Fourth of July*, or to *provide an entertainment* for its citizens or guests. Such contracts are void, and, although the

<sup>1</sup> *Vincent v. Nantucket*, 12 Cush. 105 (1853); *Gregory v. Bridgeport*, 41 Conn. 76 (1874). "A promise to indemnify a tax collector if he would collect, by pretence of his official authority, a tax which he knew was illegal, would be an agreement to violate the law, and could not be enforced." *Pike v. Middleton*, 12 N. H. 281, *per Gilchrist, J.* Selectmen, under their authority "to order and manage all of the prudential affairs of the town," may bind the town thus to indemnify its officers. 12 N. H. 281, *supra*; *ante*, sec. 30, and notes.

<sup>2</sup> *Briggs v. Whipple*, 6 Vt. 95 (1834). A by-law declaring that the officers of the corporation shall be indemnified for all lawful acts done in an official capacity is not illegal. *Irwin v. Mariposa*, 22 Upper Can. C. P. 367. The principles laid down in the text are applied to municipal corporations in England. Thus, where the suits are of such a nature that the rights of the corporation are not in any way affected by the result, costs and expenses for attorneys cannot be defrayed out of the corporate funds; as, for example, in *Reg. v. Leeds*, 4 Q. B. 796, where the question was which of two councillors was legally elected. So costs of defending *Quo warranto* against an alderman of a borough cannot be paid by the corporation. *Reg. v. Bridgewater*, 2 P. & D. 558. But where the object of the *Quo warranto* or other proceeding or suit is to affect the legal rights of the corporation, or to question its legal existence, the expenses may be defrayed out of the corporate funds. *Holdsworth v. Dartmouth*, 11 Ad. & El. 490.

An indemnity to an officer for *lawful*

*acts* gives him no claim for compensation against the consequences of unlawful acts. *Irwin v. Mariposa*, 22 Upper Can. C. P. 367. By-law to indemnify a councillor for the costs of a contested election would be illegal. *Bell and Manvers, In re*, 2 Upper Can. C. P. 507; 3 *Id.* 400. In England an agreement by a corporation with one of its officers for an increase of the salary of an office retained by him as compensation for the loss of an office of which he was deprived, is not binding unless under the seal of the corporation. *The Queen v. Stamford*, 6 Q. B. 433; see also *Cope v. Thames, &c.*, Dock and Railroad Co., 3 Ex. 841. So the appointment of a corporation solicitor should be regularly under the corporation seal. *Arnold v. Poole*, 4 M. & G. 860. A town clerk, if a solicitor, may have a lien on papers of the corporation, with respect to which he has done work as an attorney or solicitor. *The King v. Sankey*, 5 A. & E. 423. But *quære* in this country.

Where persons entrusted with the administration of a fund have incurred legitimate and proper expenses thrown upon them by their fiduciary situation, they have a right to reimburse themselves out of the funds. See *The King v. The Inhabitants of Essex*, 4 T. R. 591; *The King v. The Commissioners of Sewers for the Tower Hamlets*, 1 B. & Ad. 232; *Attorney-General v. Mayor of Norwich*, 2 M. & C. 406; *Regina v. The Mayor and Town Council of Sheffield*, L. R. 6 Q. B. 652. An attempted appropriation contrary to the terms of the trust may be restrained. *Attorney-General v. Aspinall*, 2 M. & C. 613; *Harrison's Municipal Manual*, 4th ed.; *post*, chap. xxii. sec. 709 *et seq.*

plaintiff complies therewith on his part, he cannot recover of the corporation.<sup>1</sup>

§ 150 (101). **Impounding Animals.**—Power to *impound and forfeit domestic animals* must be expressly granted to the corporation, and laws or ordinances authorizing the officers of the corporation to impound, and upon taking specified proceedings to sell the property, are penal in their nature, and where doubtful in their meaning will not be construed to produce a forfeiture of the property, but rather the reverse. The *pound-keeper cannot justify* in an action brought against him by the property-owner unless he has strictly complied with all the requirements of the law under which he acts. Thus, if he sells without giving the requisite notice, or for the full length of time required, he is liable although the owner sustains no actual injury from the omission, or the owner may treat the sale as void and recover his property.<sup>2</sup> A statute directing the

<sup>1</sup> *Hodges v. Buffalo*, 2 Denio (N. Y.), 110 (1846). Same principle. *Cornell v. Guilford*, 1 Denio, 510; *Hood v. Lynn*, 1 Allen (Mass.), 103 (1861); *Gerry v. Stoneham*, *Id.* 319; *Hale v. People*, 87 Ill. 72. Nor to celebrate *surrender of Cornwallis*. *Tash v. Adams*, 10 Cush. 252 (1852). Nor can towns in Massachusetts vote money for the *purchase of uniforms for an artillery company*. *Clafin v. Hopkinton*, 4 Gray, 502 (1855). "Corporations," says *Jewett, J.*, in *Hodges v. Buffalo*, 2 Denio, 110, "have no other powers than such as are expressly granted, or such as are necessary to carry into effect the powers expressly granted." *Ante*, secs. 89-91. In *New York* there is a statutory declaration of this common-law principle. 1 Rev. Sts. 599, secs. 1-3. "Until the case of *Hodges v. Buffalo*, 2 Denio, 110, nothing," says *Pratt, J.*, 3 Comst. 433, "was more frequent than for city authorities to vote largesses and give splendid banquets for objects and purposes having no possible connection with the growth or weal of the body politic, thus subjecting their constituents to unnecessary and oppressive taxation." Under a clause in a charter providing that "nothing in this charter shall be construed . . . as giving the power to vote money for any ordinary object except for the regular, ordinary, and usual expenses of the city," the city council of Newport

gave a *ball and banquet*; certain taxpayers obtained a temporary injunction restraining the treasurer from paying the bills, which, upon final hearing, was sustained and made perpetual. *Austin v. Coggeshall*, 12 R. I. 329; *s. p.* *Greenough v. Wakefield*, 127 Mass. 275; *post*, chap. xxii. sec. 916 *et seq.*

<sup>2</sup> *White v. Tallman*, 2 Dutch. (N. J.) 67 (1856); *Willis v. Legris*, 45 Ill. 289; *Id.* 218; *Rounds v. Stetson*, 45 Me. 596 (1858); *Gilmore v. Holt*, 4 Pick. 258 (1826); *Rounds v. Mansfield*, 38 Me. 586 (1854); *Smith v. Gates*, 21 Pick. 55, where the rule in the text was applied, although the sale was made only twenty minutes before the expiration of the time required by law. So actual knowledge, by the owner of the beasts, of the impounding thereof, is not equivalent to the *written notice* required by the statute. *Coffin v. Field*, 7 Cush. 355. Abridgment of the required notice for the shortest period avoids the sale; and so does a sale, at one bidding, of two animals having different owners. *Clark v. Lewis*, 35 Ill. 417 (1864). Purchaser must show a regular and authorized sale when his title is questioned by the former owner. *Id.* Breach of a pound, and liberating an animal therein confined, is no violation of an ordinance prohibiting "any person from opposing or interrupting any city officer in the execution of the ordinances of the

mayor to issue a warrant annually, within ten days from July 1, commanding police officers to "kill all dogs not licensed according to law, whenever and wherever found," is not in conflict with the Constitution of Massachusetts,<sup>1</sup> or of Kansas.<sup>2</sup>

§ 151 (102). **Party Walls.** — Power in a charter to pass ordinances "to authorize the erection of party walls and fences, and to regulate them," includes the power, to authorize their erection upon the application of either owner, and without the consent of the other; and such an ordinance is not unconstitutional because compensation is not provided for the land occupied by the wall.<sup>3</sup>

city." *Mayor, &c. v. Omburg*, 22 Ga. 67 (1857). Marshal must strictly comply with the ordinance, or he becomes a trespasser from the beginning. 13 Pick. 384; 4 Pick. 258; 21 Pick. 55; 13 Met. 407; 7 Cush. 355; 9 Pick. 14; 12 Met. 118; 23 Pick. 255; 12 Met. 198. Owner cannot legally break pound and rescue animals. 5 Pick. 514; 5 Cush. 267. *Pound defined.* 2 Cush. 305. Marshal cannot delegate his authority to others to impound for him generally, and in his absence, but may have assistants to act in concert with him. *Jackson v. Morris*, 1 Denio, 199. See *Friday v. Floyd*, 63 Ill. 50 (1872). Officers must use the public pound. 1 R. I. 219. *Replevin* does not lie against a pound-keeper, at common law, while the creatures are in his legal custody. Co. Litt. 47 B.; *Ib.* 145 B.; 1 Chit. Pl. 159; *Pritchard v. Stevens*, 6 Durn. & E. 522; *Ilseley v. Stubbs*, 5 Mass. 283; *Smith v. Huntington*, 3 N. H. 76; *King v. Ford*, 70 Ga. 628; but it does lie if he voluntarily parts with his legal control over them, or if he impounds them in any other places than those prescribed by the law, as, for example, in his pasture or barn, although this be done the more conveniently to furnish them with food and drink. *Bills v. Kinson*, 1 Foster (N. H.), 448 (1850). In *New Hampshire* if creatures are found "doing damage," they may be impounded, and appraisers are to ascertain "whether any damage was done." Held that the statute contemplated actual, and not merely nominal damages, to justify impounding. *Osgood v. Green*, 33 N. H. 318, and cases cited. As to power to take up and forfeit ani-

mals, at large, see also chapter on Ordinances, *post*; *infra*, sec. 348.

<sup>1</sup> *Blair v. Forehand*, 100 Mass. 136. Approved in *Mowery v. Salisbury*, 82 N. C. 175. The Act of July 3, 1863, entitled "An Act in Relation to Damages occasioned by Dogs," so far as it undertakes to charge the owner with the amount of damage done by his dog, as fixed by the selectmen of the town, without an opportunity to be heard, is unconstitutional; because it is contrary to natural justice and not within the scope of legislative authority conferred by the Constitution on the general court; and also because it is in violation of the provision of the Bill of Rights, which secures the right of trial by jury in all controversies concerning property, except in cases where it had not theretofore been used and practised. *East Kingston v. Towle*, 48 N. H. 57. The legislature have power to make towns liable for damage done within their limits by dogs, and to give towns a right of action to recover the actual damage from the owners of the dogs. *Ib.*

<sup>2</sup> *State v. Topeka*, 36 Kan. 76, where the constitutionality of ordinances regulating the keeping, registering, and destruction of dogs is fully considered, and many authorities cited in the opinion, by *Valentine, J.*

<sup>3</sup> *Hunt v. Ambruster*, 17 N. J. Eq. (2 C. E. Green) 208 (1865).

Regulations as to party-walls must be strictly followed. If a person, under color of such regulations, does injury to his neighbor, he is liable to be sued. *Pratt v. Hillman*, 4 B. & C. 269; see also *The Queen v. Ponsford*, 1 D. & L. 116. No

§ 152 (103). **Public Defence ; Loans and Taxation to pay Bounties.** — During the Rebellion acts were passed by many of the legislatures of the adhering States in effect authorizing municipalities to *raise money by loans and taxation, to pay bounties to volunteers to enable the municipality to fill its quota* under the calls of the President for troops, and thereby avoid an anticipated draft. The constitutional principles involved in legislation of this character will be found learnedly discussed in the cases below cited, which fully establish the validity of such legislation.<sup>1</sup> But without express authority a municipality possesses no such power;<sup>2</sup> yet if exercised, it may be validated by subsequent legislative action.<sup>3</sup>

§ 153 (104). **Aid to Railroad Companies ; Municipal Subscriptions and Bonds, and Taxation to pay the Same.** — The most noted of extraordinary powers conferred upon municipal and public corpo-

man has a right to presume that his neighbor will hereafter build a house adjoining to his, and erect half of his outside wall on his neighbor's ground in consequence of such presumption. *Barlow v. Norman*, 2 W. Bl. 959. An external wall cannot be said to be a party-wall. *Sims v. Estate Company*, 14 L. T. N. s. 55. A party-wall is a wall which belongs to two persons as part-owners, or divides two buildings one from another. *Weston v. Arnold*, L. R. 8 Ch. Ap. 1084. The English Stat., 14 Geo. III. ch. lxxviii., was held not to make party-walls common property. *Matts v. Hawkins*, 5 Taunt. 20. If one proprietor added to the height of such a party-wall, and the other pulled down the addition, the first might maintain trespass for pulling down so much of it as stood on the half of the wall which was erected on his own soil. *Ib.* The property in a wall, though erected at joint expense, follows the property of the land whereon it stands. *Ib.* Power to pass ordinances "to authorize the erection of party-walls, &c., and to regulate them," has been held to include the power to authorize their erection upon the application of either owner, and without the consent of the other. *Hunt v. Ambruster*, 17 N. J. Eq. 208 ; *Harrison's Municipal Manual*, 4th ed. Further as to party-walls: *McAdam on Landlord and Ten.* 145-160, and works on Easements.

<sup>1</sup> *Speer v. School Directors*, 50 Pa. St.

150, two judges dissenting. See *Hilbish v. Catherman*, 64 Pa. St. 154 (1870), where the prior cases in that State are commented on by *Agnew, J.* *State v. Richland Township*, 20 Ohio St. 362 ; *Thompson v. Pittson*, 59 Me. 545 ; *Broadhead v. Milwaukee*, 19 Wis. 652 ; *State v. Tappen*, 29 Wis. 664 ; s. c. 9 Am. Rep. 622 ; *Sperry v. Horr*, 32 Iowa, 184 ; *Booth v. Woodbury*, 32 Conn. 118 ; *Shackford v. Newington*, 46 N. H. 415 ; *Lowell v. Oliver*, 8 Allen (Mass.), 247 ; *Freeland v. Hastings*, 10 Allen, 570 ; *Comer v. Folsom*, 13 Minn. 219 ; *Dayton v. Rounds*, 27 Mich. 82 ; *Cooley, Const. Lim.* 219-229. *Cooley on Taxation* (2d ed.) 136, collects the cases and states the result. *Veazie v. China*, 50 Me. 518 ; *Clark Co. v. Lawrence*, 63 Ill. 32 ; *Ib.* 40 ; *Bowles v. Landaff*, 59 N. H. 164 ; *Gould v. Raymond*, *Ib.* 260.

<sup>2</sup> *Stetson v. Kempton*, 13 Mass. 272 ; *Fiske v. Hazzard*, 7 R. I. 438 ; *Shackford v. Newington*, *supra* ; *ante*, sec. 30. It is not the duty or function of a town to procure the passage of an act by the legislature, authorizing it to pay bounties. An appropriation for that purpose is illegal. *Mead v. Acton*, 129 Mass. 341.

<sup>3</sup> *Booth v. Woodbury*, 32 Conn. 118 ; *Kunkle v. Franklin*, 13 Minn. 127 ; *Comer v. Folsom*, 13 Minn. 219 ; *Hilbish v. Catherman*, 64 Pa. St. 154 (1870) ; *State v. Richland Township*, 20 Ohio St. 362 (1870) ; *ante*, sec. 79.



rations is *the authority to aid in the construction of railways* by subscribing to their stock, issuing negotiable bonds as a means of paying their subscription, and taxing the inhabitants or the property within their limits to pay the indebtedness thereby incurred. Legislation of this kind belongs to a period comparatively recent, and has been more or less resorted to at times, by almost every State in the Union. As it is an author's duty to state what the law is rather than what, in his judgment, it ought to be, he is constrained to admit that a long and almost unbroken line of judicial decisions in the courts of most of the States has established the principle that, in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal or public corporation to aid, in the manner above indicated, the construction of railways running near, or to, or through its territory. The cases on the constitutional validity of such legislation are referred to in the note.<sup>1</sup> Notwithstanding the opinion of so many learned and

<sup>1</sup> *Goddin v. Crump* (act authorizing the city of Richmond to subscribe stock in a company incorporated to improve the navigation of the James River, and to build a road to the falls of the Kanawha River). 8 Leigh (Va.), 120 (1837). This is the earliest case of the class. *Bridgeport v. Railroad Co.*, 15 Conn. 475 (1843); *Society, &c. v. New London*, 29 Conn. 174; *Douglass v. Chatham*, 41 Conn. 211 (1874); *Nichol v. Nashville*, 9 Humph. (Tenn.) 252 (1848); *Powers v. Superior Court*, 23 Ga. 65 (1857); *Talbot v. Dent*, 9 B. Mon. (Ky.) 526 (1849); *Slack v. Railroad Co.*, 13 B. Mon. (Ky.) 1 (1852); *Maddox v. Graham*, 2 Met. (Ky.) 56; *Commonwealth v. McWilliams*, 11 Pa. St. 61 (1849); *Sharpless v. Mayor, etc.*, 21 Pa. St. 147; *Ib.* 188; *Commonwealth v. Perkins*, 43 Pa. St. 410; 47 Pa. St. 189; *Cotton v. County Comm'rs*, 6 Flor. 610 (1856); *Railroad Co. v. Comm'rs*, 1 Ohio St. 77 (1852); *Cass v. Dillon*, 2 Ohio St. 607 (1853); *Ohio v. Comm'rs, &c.* 6 Ohio St. 280; 7 Ohio St. 327; 8 Ohio St. 394; 12 Ohio St. 596, 624; 14 Ohio St. 569; *Strickland v. Railroad Co.*, (Miss.) MSS.; *City v. Alexander*, 23 Mo. 433 (1856); 39 Mo. 485; *Leavenworth County v. Miller*, Supreme Court of Kansas (1871), 7 Kan. 479; s. c. 12 Am. Rep. 425. The opinion of *Valentine, J.*, covers the whole ground of controversy. *Kingman, C. J.*, concurred, and *Brewer, J.*, dissented. Clarke

*v. Rochester*, 24 Barb. 446 (1857); *Bank of Rome v. Rome*, 18 N. Y. 38 (1858); *Starin v. Genoa*, 23 N. Y. 439 (1861); *People v. Mitchell*, 35 N. Y. 551 (1866); *Police Jury v. Succession of McDonough*, 8 La. An. 341; *Aurora v. West*, 9 Ind. 74 (1857); 22 Ind. 88; *Mt. Vernon v. Hovey*, 52 Ind. 563 (1876); *Robinson v. Bidwell*, 22 Cal. 379; *Stein v. Mayor, &c.*, 24 Ala. 591 (1854); *Gibbons v. Railroad Co.*, 36 Ala. 410; *Prettyman v. Supervisors*, 19 Ill. 406 (1858); s. p. 24 Ill. 75, 208; *Butler v. Dunham*, 27 Ill. 474 (1861); *Robertson v. Rockford*, 21 Ill. 451; *Chicago, &c. Railroad Co. v. Smith* (donation to Railroad Co.), 62 Ill. 268 (1871); s. c. 14 Am. Rep. 99; *Sibley v. Mobile*, 3 Woods C. C. 535; and see also as to authority to precinct to levy tax to maintain a bridge, *Shaw v. Dennis*, 5 Gilm. (Ill.) 405; *San Antonio v. Jones*, 28 Tex. 19; *Copes v. Charleston*, 10 Rich. (S. C.) 491 (1857); *Augusta Bank v. Augusta*, 49 Me. 507; *Clark v. City, &c.*, 10 Wis. 136; *Ib.* 195 (1859) (compare *Whiting v. Sheboygan Railroad Co.*, *infra*). The Supreme Court of *Wisconsin*, in an opinion delivered in *Phillips v. Albany*, 28 Wis. 340 (1871), say the power of the legislature to authorize municipal subscriptions to the stock of railroads is settled by former decisions in this State, as well as in other States, though the majority of this court would be disposed to deny the power, if it were

eminent judges, there remain serious doubts as to the soundness of the principle, viewed simply as one of constitutional law. Regarded

a new question. *s. p. Rogan v. Watertown*, 30 Wis. 259 (1872); *Lawson v. Railway Co.*, 30 Wis. 597; *U. S. v. New Orleans*, 2 Woods C. C. 230. The Supreme Court of the United States have decided that the power may be conferred by the legislature. *Infra*, sec. 158; *Thompson v. Lee County*, 3 Wall. 327; *Knox County v. Aspinwall*, 21 How. (U. S.) 539, 547 (1858); *Zabriskie v. Railroad Co.*, 23 How. 381; *Amey v. Mayor*, 24 How. 365, 376; *Gelpecke v. Dubuque*, 1 Wall. 175 (1863); *Mercer County v. Hackett*, *Ib.* 81; *Meyer v. Muscatine*, *Ib.* 384; *Baldwin v. Otoe County*, 111 U. S. 1; *Caldwell v. Justices*, 4 Jones (N. C.) Eq. 323; *Taylor v. Newberne*, 2 Jones, 141 (1854); *s. p. Hill v. Forsythe Co.*, 67 N. C. 367 (1870). In *Iowa* the constitutionality of railroad subscriptions by municipalities was first (1853) affirmed in *Dubuque County v. Railroad Co.*, 4 G. Greene (Iowa), 1; afterwards (1862) denied, *State v. Wapello County*, 13 Iowa, 388; denial adhered to down to 1869, *Hanson v. Vernon*, 27 Iowa, 28; but note the virtual, yet not acknowledged overthrow of the line of decisions denying the power, in *Stewart v. Polk County*, 30 Iowa, 1 (1870); *Renwick v. Davenport, etc. Railway Co.*, 47 Iowa, 511; *Snell v. Leonard*, 55 Iowa, 553. The legislative and judicial history of the subject is fully stated in *King v. Wilson*, 1 Dillon's C. C. R. 555 (1871). By the Constitution of *Tennessee*, the legislature has power to authorize counties and incorporated towns to impose taxes for "county and corporation purposes." In *Nichol v. Mayor, &c. of Nashville*, 9 Humph. 252 (1848), it was held, notwithstanding this provision, that the legislature possessed the power to authorize municipal corporations to subscribe for the stock of railway companies whose roads run to or near such corporations, and that this was a *legitimate corporate purpose*. So in *Florida*, held to be a "county purpose," within the meaning of the Constitution; but *quære*. There is nothing in the Constitution of *Alabama* prohibiting the legislature from authorizing a municipal corporation to levy a tax on the real estate within the corporation

to aid in the construction of a railroad, even though the road extends beyond the limits of the corporation, or even of the State. So held in *Stein v. Mobile*, 24 Ala. 591 (1854). An act authorizing a municipal corporation to borrow money to aid in the construction of a railroad, upon the written assent of two-thirds of the resident taxpayers, or upon the approval of two-thirds of the taxpaying electors, is constitutional and valid; and it is not open to the objection that it submits a legislative question to the town. *Starin v. Genoa*, 23 N. Y. 439 (1861); *Gould v. Sterling*, *Ib.* 439, 456; *Bank of Rome v. Rome*, 18 N. Y. 38; *People v. Mead*, 24 N. Y. 124; *Horton v. Thompson*, 71 N. Y. 513; affirmed in *Town of Scipio v. Wright*, 101 U. S. 665; *s. c.* 21 Alb. L. Jour. 476. These cases distinguished on this point from *Barto v. Himrod*, 4 Seld. (8 N. Y.) 483. *Ante*, sec. 44. Since the common law does not favor the principle that a majority of taxpayers of a municipal corporation may encumber the property of a minority against their will, in aid of a railroad or other corporation, the requirements of statutes authorizing such aid must be strictly observed. *People v. Hulburt*, 46 N. Y. 110; *Cowdrey v. Town of Canadea*, 16 Fed. Rep. 532. In *Smith v. Fond du Lac*, 8 Fed. Rep. 289, *Harlan, J.*, decided that a statute authorizing a city to subscribe for railroad stock and issue its bonds therefor, after a vote passed by a majority of the voters, without limiting the amount, was not in conflict with a constitutional provision in *Wisconsin* restricting the power of municipalities to borrow money, contract debts, and loan their credit.

The Supreme Court of *Minnesota* has affirmed the validity of compulsory aid to railways, saying that it is wholly for the legislature to determine whether the aid shall be by *subscribing* to the stock and issuing bonds in payment, or by a *donation of money or bonds* to secure their construction, the court in either case regarding the use to be a *public use* for which taxation may be authorized. *Davidson v. Ramsey County*, 18 Minn. 482 (1872). And

in the light of its effects, however, there is little hesitation in affirming that this invention to aid the enterprises of private corporations has proved itself baneful in the last degree.<sup>1</sup>

§ 154. **Municipal Indebtedness; Negotiable Bonds.**—It is estimated that *the indebtedness of municipal and public corporations in this country* has already reached the enormous sum of \$1,000,000,000, and it is constantly increasing. A large portion of this indebtedness is evidenced by *negotiable bonds*, which are held by thousands of persons, at home and abroad, as an investment. These bonds have been issued for a great variety of purposes, such as the erecting of public buildings, the making of municipal improvements, and in payment of subscriptions for the stock of railway corporations, or as donations to aid them in the construction of their roads located in or near the municipality or public corporation thus extending its assistance.<sup>2</sup>

§ 155. **Same subject.**—The power conferred upon municipal and public corporations to *issue commercial securities for such purposes* is of comparatively recent origin, and it has undeniably been attended with very serious, and it is perhaps not too strong a statement to add, disastrous consequences. One of these is the stimulus which the long credit commonly provided for effectually supplies to over-indebtedness. The bonds usually fix a time, twenty or thirty years distant, for payment of the principal. Those who vote the debt, and the councils or bodies which create it and issue the bonds, do so without much hesitation, as the burden is expected to fall principally on *posterity*. A learned justice of the Supreme Court of the United States<sup>3</sup> has very fitly described the effect witnessed as a *mania* for running in debt for public improvements. It has elsewhere been characterized as an “epidemic insanity” inducing extravagant corporate subscriptions to public works.

the validity of such legislation has also been affirmed by the Supreme Court of *Nebraska*, *Crounse and Lake*, JJ., concurring, and *Mason*, C. J., dissenting,—the opinion of *Crounse*, J., reviews the principal cases; *Hallenbeck v. Hahn*, 2 Neb. 377; and by the Supreme Court of *California*, *Stockton, &c. Railroad Co. v. City of Stockton*, 41 Cal. 147 (1871); and in *Alabama*, *Opelika v. Daniel*, 59 Ala. 211; *Selma & Gulf Railroad, In re*, 45 Ala. 696 (1871); and in *Kentucky*, *Allison v. Lou.*, H. C. & W. Railway Co., 10 Bush (Ky.), 1 (1873). Text approved. Jack-

sonport v. Watson, 33 Ark. 704; *Richeson v. People*, 115 Ill. 450.

<sup>1</sup> Cooley, Const. Lim. 5th ed. 264 *et seq.*, discusses the constitutional principles involved in such legislation with his accustomed clearness and ability.

<sup>2</sup> As to coupon bonds, see *Daniel on Neg. Instr.* sec. 1486 *et seq.* *Post*, chapter xiv. on Contracts, where the subject of Municipal Bonds is considered at large. The mode of enforcement is presented in ch. xx. *post*, on Mandamus.

<sup>3</sup> Mr. Justice Davis.

§ 156. **The Abuse of the Power.** — In many parts of the country, and particularly in the West, this mania has become general in cities, counties, townships, and school-districts, and large and burdensome debts have been thoughtlessly created. The author has known new counties in a western State not containing over 10,000 inhabitants, vote for a single railway, bonds to the amount of \$300,000, drawing ten per cent interest, payable annually; and instances are not infrequent where bonds have been issued greater than the assessed value of all the taxable property at the time within the municipal or territorial subdivision. No check against the incurring of over-indebtedness is so effectual as the one *that you must pay as you go*; but this is wholly disregarded in the legislation which authorizes bonds payable at a remote period. Another serious consequence of this policy is that even the *interest* on these bonds often proves to be a heavy burden upon the community, and in many instances the bonds have been issued fraudulently by the public or municipal officers, and no consideration or none of value has been in fact received therefor. They may, indeed, have the stock of the railway company; but in most cases, under the prevailing mode of constructing railways, the stock is utterly valueless. When the sting of taxation is felt, and when the taxpayer knows that the bonds were fraudulently issued, and even when he feels that their issue was improvident, experience shows that repudiation, or attempted repudiation is the next stage, involving a forfeiture of the public faith pledged for their payment. Occasionally it has been witnessed that the *State* in all its departments has actively sympathized with the repudiating municipality, and the public faith has been redeemed only, if at all, through the coercion of the Supreme Court of the United States. In a few instances, indeed, the *States* have set the example of repudiating their own obligations issued in aid of railways; and it was in a case of this kind that the Supreme Court at Washington felt itself bound to declare "that the faith of the State [of Minnesota], solemnly pledged, has not been kept; and were she amenable to the tribunals of the country, as private individuals are, no court of justice would withhold its judgment against her." Examples of this kind are demoralizing, and cannot safely become general or frequent.

§ 157 (105). **Constitutional Principles involved.** — It is not proposed here to enter into a discussion of the *constitutional principles* involved in such legislation. The arguments in favor of the power are fully presented in the leading case of *Sharpless v. The Mayor*,<sup>1</sup>

<sup>1</sup> *Sharpless v. Mayor*, 21 Pa. St. 147. See, also, *Am. Law Rev.* Oct. (1870); *infra*, sec. 158.

and against it in *Hanson v. Vernon*,<sup>1</sup> in *Whiting v. Sheboygan Railway Company*,<sup>2</sup> and in *The People v. Township Board of Salem*,<sup>3</sup> to

<sup>1</sup> *Hanson v. Vernon*, 27 Iowa, 28 (1869).

<sup>2</sup> *Whiting v. Sheboygan Railway Co.*, 25 Wis. 167 (1870), opinion by *Dixon*, C. J.; s. c. 3 Am. Rep. 30; s. c. 9 Am. Law Reg. (n. s.) 156, and note; *Rogan v. Watertown*, 30 Wis. 259 (1872).

<sup>3</sup> *People v. Township Board of Salem*, 9 Am. Law Reg. (n. s.) 487, and notes (1870); s. c. 20 Mich. 452. "Bonds like these are of modern invention, and when counties and towns were decoyed into the use of them for the purpose of railroad corporations they had to obtain enabling statutes before they could prostitute municipal seals to any such purpose. And as soon as the people [of *Pennsylvania*] began to feel the consequences of applying the fundamental principle of commercial paper to their bonds, they altered their organic law so as to render such bonds and enabling statutes impossibilities in the future." *Per Woodward*, C. J., *County v. Brinton*, 47 Pa. St. 367 (1864). The evil of these subscriptions was the cause of the amendment to the Constitution. *Per Read*, J., *Pennsylvania Railroad Co. v. Philadelphia*, *Id.* 193. *The Constitution of Pennsylvania* (1874) provides: "The General Assembly shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution, or individual." This is in substance the amendment to the Constitution made in 1857. Construed in *Pennsylvania Railroad Co. v. Philadelphia*, 47 Pa. St. 189; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Wilkesbarre Hospital v. Luzerne County*, 84 Pa. St. 55. Bounty tax to volunteers not within the prohibition. *Speer v. School Directors*, 50 Pa. St. 150.

The *Ohio Constitution* (art. viii. sec. 6) provides that "The General Assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money

or loan its credit to, or in aid of, any such company, corporation, or association;" and this was held not to prohibit the legislature from authorizing a municipal corporation to engage in building a railroad mainly outside of the State on its own account. *Walker v. Cincinnati*, 21 Ohio St. 14 (1871); s. c. 11 Am. Law Reg. (n. s.) 346, and note of Judge *Redfield*; s. c. 8 Am. Rep. 24. Considering the evil which this provision of the Constitution was aimed at, it seems difficult to avoid the conclusion that this construction thwarts the intention and purpose for which the provision was designed and adopted.

This case illustrates the dangerous nature of the invention of bringing the taxing power to aid in the building of railway lines, and particularly does it subvert all previous notions of the appropriate powers, functions, and duties of municipalities. Here a single city, in the face of the Constitution, was authorized to borrow \$10,000,000, and issue its bonds in payment, to be appropriated to the construction of a long railroad line by itself and for itself, lying chiefly in other States; and yet the validity of the act giving the authority was sustained. In May, 1873, the same constitutional provision was before the Supreme Court of the State, and the act of 1872, mentioned below, was held to be in conflict with it, since the legislature could not do indirectly what it was prohibited from doing directly. The court held: 1. Taxation can only be authorized for public purposes. When, therefore, a statute authorizes a county, township, or municipality to levy taxes not above a given per cent on the taxable property of the locality for the purpose of building so much of a railroad as can be built for that amount, and the part of a railroad so to be built can be of no public utility unless used to accomplish an unconstitutional purpose, such tax is illegal and cannot be enforced. 2. Where public credit or money is furnished by any of the subdivisions of the State named in the Constitution, to be used in part in the construction of a work which, under the

which, and to the other cases before cited, the reader is referred. The judgments affirming the existence of the power have generally met with strong judicial dissent and with much professional disapproval, and experience has demonstrated that the exercise of it has been productive of bad results. Taxes, it is everywhere agreed, can only be imposed for *public* objects, and taxation to aid in building the roads of *private railway companies*, even if the use is a public use, is hardly consistent with our traditional respect for the inviolability of private property and individual rights. Fraud often accompanies the exercise of the power, and extravagant indebtedness is the result; and, sooner or later, the power will be denied by constitutional provision, as it already is in Pennsylvania, Ohio, Illinois,<sup>1</sup>

statute authorizing its construction, must be completed, if completed at all, by other parties out of their own means, who are to own, or have the beneficial control and management of the work when completed, public money or credit thus used can only be regarded as furnished for or in aid of such parties. The act of April 23, 1872, to authorize counties, townships, and other municipalities therein named to build railroads, &c. [59 O. L. 84], authorizes the raising of money by taxation, which is equally applicable to the unlawful purpose of aiding railroad companies and others engaged in building and operating railroads, as it is to any lawful purpose, and gives to the officers entrusted with the control and operation of the money thus raised no means or power of discrimination as to the lawfulness of the work or purpose to which it is to be applied; and this is in contravention of sec. 6. art. viii. of the Constitution, and therefore void.

By amendment of the *Constitution of New York*, which took effect January 1, 1875, "No county, town, or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association, or corporation." *People v. Ft. Edward*, 70 N. Y. 28 (1879).

The *Constitution of Indiana* provides that "no county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription." Art. x. sec. 10. What is an "incorporated company," and how and when stock may be paid for, see *Lafayette, &c. Railroad Co. v. Geiger*, 34 Ind. 185

(1870), where the subject is very elaborately considered by *Buskirk, J.* *John v. Cin., &c. Railroad Co.*, 35 Ind. 539; *Aspinwall v. Jo Daviess Co.*, 22 How. 364. The new *Constitution of Missouri* cuts up the business by the roots. Art. iv. sec. 47.

<sup>1</sup> The *Constitution of Illinois*, which went into effect July 2, 1870, provided that no municipality should "ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation. *Provided, however*, That the adoption of this article shall not be construed as affecting the right of such municipality to make such subscriptions where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption." It has been held that the effect of this section was to withdraw a power, previously conferred by the legislature, to issue bonds in payment of subscriptions and donations duly voted to railroads, when the power had not been exercised before it went into effect; but that subscriptions and donations legally voted before that time could be completed after it. *Concord v. Robinson*, 121 U. S. 165. As to the power of the legislature of *Illinois* under the Constitution of 1848 to validate the action of a town in voting a subscription to railway stock without authority, see *Bolles v. Brimfield*, 120 U. S. 759. The *proviso* includes *donations* as well as subscriptions. *Fairfield v. County of Galatin*, 100 U. S. 47, overruling *Concord v. Portsmouth Savings Bank*, 92 U. S. 625; *Enfield v. Jordan*, 119 U. S. 680.

New York, Missouri, and possibly some of the other States, or by legislative enactment. It is too late to expect, in view of the line of decisions referred to, that the courts in the States which have already passed upon the question will retrace their steps, and too much to hope that the courts in other States will have the boldness successfully to stem the strong tide of authority, strengthened, as it will be, by temporary popular feeling and corporate influence.

§ 158 (105 a). **Same subject. Decisions of the Supreme Court of the United States.**—Since the first edition of this work, the Supreme Court of the United States, following repeated intimations of its judges in previous cases, *have directly sustained the validity of legislative acts authorizing municipal aid to railways.*<sup>1</sup> In view of the prior adjudications of that tribunal in the municipal bond cases, hereafter referred to in the chapter on Contracts, and of the almost uniform holding of the State courts, no other result could have been anticipated. This ends judicial discussion if it does not terminate doubts. The Supreme Court, in reaching this result, places its judgment upon the ground that highways, turnpikes, canals, and rail-

This section did not take away the power, which the legislature had under the previous Constitution, of passing a curative act declaring an election in favor of authorizing a subscription to a railroad valid and giving power to issue bonds therefor, when the election was held under a mere power to borrow money and issue bonds, the statute being insufficient to warrant a subscription to a railroad. *Jonesboro City v. Cairo & St. Louis R. R. Co.*, 110 U. S. 192. The section held not to invalidate township bonds, which were issued in pursuance of a vote held on the same day the new Constitution was adopted (July 2, 1870). *Louisville v. Savings Bank*, 104 U. S. 469.

The *Constitution of Mississippi* of 1869, art. xii. § 14, provides that, "The legislature shall not authorize any county, city, or town, at a special election, or regular election, to be held therein, shall assent thereto." Under this provision it is held that the legislature of that State has no authority to pass an act validating an issue of bonds, illegally issued before the pro-

vision went into effect, under a law which, though constitutional when enacted, was not within the terms of the provision. *Katzenberger v. Aberdeen*, 121 U. S. 172. *Held*, also, under the same provision, that an act ratifying all subscriptions to the capital stock of a corporation "made by any county, city, or town in this State, which were not made in violation of the Constitution," did not with sufficient certainty ratify a subscription made in pursuance of a vote, when neither the election nor the subscription had been authorized by the legislature; and that bonds issued under authority of the pretended act of ratification were void for want of power to issue them. *Hayes v. Holly Springs*, 114 U. S. 120. This provision requires the assent of only two-thirds of those actually voting, not two-thirds of all those qualified to vote. *Carroll County v. Smith*, 111 U. S. 556.

<sup>1</sup> *Olcott v. Supervisors*, 16 Wall. 678 (1872); *Railroad Co. v. Otee County*, 16 Wall. 667 (1872); s. c. reprinted, 2 Neb. 496; *St. Joseph Township v. Rogers*, 16 Wall. 664 (1872); s. c. 7 Albany Law Journal, 362; *Rogers v. Burlington*, 3 Wall. 654; *Mitchell v. Burlington*, 4 Wall. 270.

ways, although owned by individuals under public grants or by private corporations, are *publici juris*; that they have always been regarded as governmental affairs, and their establishment and maintenance recognized as among the most important duties of the State, in order to facilitate transportation and easy communication among its different parts; and hence the State may put forth, in favor of such improvements, both its power of eminent domain (as it constantly does) and its power to tax, unless there be some special restriction in the Constitution of the particular State. These powers may, in the judgment of the court, be lawfully exerted, because the use is in its nature a public use, and these works are subject to public control and regulation (except so far as this right has been lawfully parted with by valid legislative contract), notwithstanding they may be exclusively owned by private persons or corporations. It must be admitted that compulsory taxation in favor of railways and like public improvements owned by individuals or companies is an exercise of power going quite to the verge of legislative authority. Although it is a doctrine that must now be considered as judicially settled, still it is one which has, as we think justly, encountered a vigorous opposition, both on the ground of expediency and of power; and the exercise of authority has, as before noticed, been so disastrous as already, in some of the States, to have led to constitutional provisions for the protection of the citizen.

§ 159 (105 b). **Principle does not extend to Compulsory Taxation for Private Enterprises.** — It is obvious, from the foregoing statement of the grounds upon which the validity of such legislation is made to rest,<sup>1</sup> that it furnishes no support for the *validity of taxation* in favor of enterprises and objects which are *essentially private*. We consider the principle equally sound and salutary, that the mere incidental benefits to the public or the State, or to any of its municipalities or divisions, which result from the pursuit by individuals or corporations of ordinary branches of business or industry, do not constitute a *public use* in the legal sense, which justifies the exercise either of the power of eminent domain or of taxation. It would have been well, in our judgment, if this doctrine had been extended in its application to railway companies; but the doctrine that private enterprises or objects cannot be aided by taxation is so fundamental that it cannot be denied or disregarded without unsettling the foundations of individual rights, without recognizing legislative omnipotence over private property, or the irresponsible despotism of a local majority, and unwisely opening the way for frauds and

<sup>1</sup> *Supra*, sec. 157.



abuses which, in view of the past, cannot be contemplated without deep anxiety.<sup>1</sup>

<sup>1</sup> The doctrine of the text finds interesting illustrations and authoritative support in several adjudged cases determined by courts of great respectability. One is *Lowell v. Boston*, decided by the Supreme Judicial Court of Massachusetts in 1873. 111 Mass. 463 ; s. c. 15 Am. Rep. 39. After the great fire in Boston, in 1872, the legislature enacted that the city might issue its bonds to the amount of \$20,000,000, the proceeds of which three commissioners, appointed by the mayor, were authorized to *loan* in a safe and judicious manner "in such sums as they shall determine to the owners of land, the buildings upon which were burned by the fire in said Boston on the ninth and tenth days of November, 1872, upon the notes or bonds of said owners secured by first mortgages of said land ; said mortgages to be conditioned that the rebuilding shall be commenced within one year from the first day of January, 1873, and said commissioners to have full power to apply the proceeds of said bonds in making said loans in such manner, and to make such further provisions, conditions, and limitations in reference to said loans, and securing the same, as shall be best calculated, in their judgment, to ensure the employment of the same in rebuilding upon said land burned over, and the payment thereof to the said city."

It will be seen that the object of this act, as shown by its provisions, was "to ensure the speedy rebuilding on land the buildings upon which were burned" by the great fire ; and the question was as to the right of the State to impose any taxes for this object, and this depended upon the further question, whether this object was, in a legal sense, a public object.

The court distinctly held, to use the language of the rescript sent down in the case, that taxes can only be laid "for some public service or some object which concerns the public welfare ;" that "the preservation of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in

its essential character, a private and not a public object. . . . That the incidental advantages to the public or to the State which result from the promotion of private interests, or the prosperity of private enterprises or business, does not justify their aid by taxation. . . . That, as a judicial question, the case is not changed by the magnitude of the calamity which has created the emergency." And finally the court say, "The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature, and the city cannot legally issue the bonds for the purposes named in the act." 111 Mass. 463. This case is followed and approved in *State v. Osawkee Township*, 14 Kan. 418 (1875), and the "relief bonds" which the township was authorized to issue were held not to be for a public purpose, and therefore void. s. c. 19 Am. Rep. 99 ; *McConnell v. Hamm*, 16 Kan. 228 ; *C. B. U. P. Railroad Co. v. Smith*, 23 Kan. 745.

Another case is *Allen v. Inhabitants of Jay*, 60 Me. 124 (1871) ; 12 Am. Law Reg. (N. S.) 481. The legislature authorized the town of Jay to lend \$10,000 to enable the borrowers to build a saw-mill and grist-mill, and to exempt the mills from taxation for ten years. On the ground that the purpose was not a public one, the act was adjudged unconstitutional. See opinions of the judges, 58 Me. Appendix, 590 *et seq.*, given to the House of Representatives. The doctrine was adhered to in *Brewer Brick Co. v. Brewer*, 62 Me. 62 (1873) ; s. c. 16 Am. Rep. 395, and ably vindicated by *Appleton, C. J.* ; *Bissell v. Kankakee*, 64 Ill. 249 (1872) ; *Mather v. Ottawa*, 114 Ill. 659, noted *supra*, sec. 127, note.

Another case is *The Commercial National Bank v. City of Iola*, decided by the U. S. Circuit Court for the district of Kansas, June, 1873, reported in 2 Dillon, C. C. 353, affirmed 20 Wall. 655 (1874). For the same reasons the act of the legislature which authorized the city of Iola to appropriate \$50,000 to aid private persons in the erection and equipment of buildings,

§ 160. **The Field reviewed ; The Lessons it teaches.** — Hundreds of municipal and public corporations in the country have rendered themselves bankrupt by the mania to aid railways, and hundreds of others are groaning under oppressive burdens thereby occasioned. In looking over the field, it is now plain that most of the evils originating from this source, and from which the municipalities are suffering, have sprung not so much from the mere power to aid railways, as from the manner in which the power has usually been conferred. If municipalities had been forbidden to issue their bonds, and permitted to give such aid only to the extent of taxes, to be levied within a short limited period of time, this *pay-as-you-go policy* would have been an effectual restraint upon extravagance in this direction. But the power to give the aid was usually accompanied with express authority to issue bonds, payable twenty or thirty years distant, in general without limit as to amount ; and thus those who created the debt were almost indifferent as to the amount of it, since the main burden was expected to fall on posterity. This led to the wildest extravagance. Bonds thus issued have been treated by the Supreme Court of the United States as possessing all the attributes of commercial paper, and unimpeachable in the hands of innocent holders for value, notwithstanding the frauds of the municipal officers, or non-compliance with the conditions upon which the bonds were authorized to be issued. Under the doctrine of the Supreme Court the usual restraints and checks upon the power have proved

at or near the city, to be used for manufacturing purposes, was held unconstitutional, and the bonds void which had been issued to raise the money thus appropriated. The case was distinguished from those relating to railway aid bonds, and also construes the provision of the Constitution of the State that "the legislature shall pass no special act conferring corporate powers." *Ante*, sec. 46. And more recently the Court of Appeals of New York have decided in the same way, holding an act to authorize municipal bonds to pay for stock in a private corporation to construct a water privilege and to manufacture lumber, to be void. *Weismer v. Village of Douglass*, 64 N. Y. 91 (1876). Text approved in *Feldman v. Charleston*, 23 S. C. 57, where bonds issued by a city, under legislative authority, for the purpose of lending them to individuals to assist them in rebuilding the edifices destroyed by a great fire, were held void. A statute authorizing a municipality to issue bonds, to be

paid by taxation, to aid in the improvement of a water-power, and, connected therewith, authorizing the council of the municipality to secure such water-power as might be deemed needful for the use of the fire department, held to be unconstitutional, as authorizing a debt and tax for a private purpose. *Coates v. Campbell*, 37 Minn. 498.

Further, as to extent and nature of the taxing power, and distinction between public and private use, see *post*, secs. 735, 736 ; *Bloodgood v. Railroad Co.*, 18 Wend. 65 ; *Jenkins v. Andover*, 103 Mass. 94, holding invalid a statute authorizing taxation in favor of a private incorporated academy. Same principle : *Curtis v. Whipple*, 24 Wis. 350 ; *People v. Salem*, 20 Mich. 452 ; *Freeland v. Hastings*, 10 Allen, 570 ; *Tyson v. School Directors*, 51 Pa. St. 9 ; *Thompson v. Pittson*, 59 Me. 545 (1871) ; *Savings Assoc. v. Topoka*, 3 Dillon, 376 ; note 15, *Am. & Eng. Corp. Cas.* 356.

practically valueless, since if they were disregarded or evaded and the bonds issued and negotiated, they became valid and enforceable obligations. The result of legislative authority thus conferred and thus construed is seen in the vast municipal debt of the country, largely created in aid of railways, and in our municipalities, blighted and burdened with debt. This retrospect after the battle has been lost will tend to confirm the dissenting judges in their opinions, although they are compelled to acknowledge the law to be otherwise settled.<sup>1</sup>

§ 161 (106). **Express Power essential.** — The courts concur, however, with great unanimity, in holding that there is *no implied authority in municipal corporations to incur debts or borrow money in order to become subscribers to the stock of railway companies*, and that such power must be conferred by *express grant*.<sup>2</sup> To become stockholders in private corporations is manifestly foreign to the purposes intended to be subserved by the creation of corporate municipalities; the practice of bestowing such an abnormal power is of modern origin, and hence the rule that the authority must be specially conferred, and cannot be deduced by inference or implication from the ordinary municipal grants.<sup>3</sup>

<sup>1</sup> See further, chapter xiv. on Contracts, *post*.

<sup>2</sup> The power to become a stockholder in a railroad company must be expressly conferred upon a municipal or public corporation, *Kelley v. Milan*, 127 U. S. 139; *Norton v. Dyersburg*, 127 U. S. 160; *Wells v. Supervisors*, 102 U. S. 625; *Concord v. Robinson*, 121 U. S. 165; *Kelly v. Town of Milan*, 21 Fed. Rep. 842; *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611; *Welch v. Post*, 99 Ill. 471; *Katzenberger v. Aberdeen*, 16 Fed. Rep. 745. Authority "to obtain money on loan on the faith and credit of a city for the purpose of contributing to works of internal improvement" held to authorize the city to *guarantee payment of the bonds* of a railroad company. *Savannah v. Kelly*, 108 U. S. 184. See *post*, sec. 507 *et seq*.

<sup>3</sup> *Aurora v. West*, 22 Ind. 88, 508 (1864); *Starin v. Genoa*, 23 N. Y. 439 (1869); *Gould v. Sterling*, *Id.* 439, 456; *Atchison v. Butcher*, 3 Kan. 104 (1865); *Burnes v. Atchison*, 2 Kan. 454; *Bank v. Rome*, 18 N. Y. 38; *Bridgeport v. Housa-*

*tonic Railway Co.*, 15 Conn. 475; *Marsh v. Fulton Co.*, 10 Wall. 676 (1870); *Cook v. Manufacturing Co.*, 1 Sneed (Tenn.), 698 (1854); *Gaddis v. Richland Co.*, 92 Ill. 119; *Pitzman v. Freeburg*, 92 Ill. 111; *McCoy v. Brant*, 53 Cal. 247; *Lewis v. Shreveport*, 3 Woods C. C. 205; *Nichol v. Nashville*, 9 Humph. (Tenn.) 252; *City and County of St. Louis v. Alexander*, 23 Mo. 483 (1856); *Jones v. Mayor, &c.*, 25 Ga. 610 (1858); *Oebicke v. Pittsburg*, U. S. C. C. (1859); 7 Am. Law Reg. 725; *Duanesburg v. Jenkins*, 40 Barb. 574; *French v. Teschemaker*, 24 Cal. 518 (1864); *People v. Mitchell*, 35 N. Y. 551 (1866); *St. Joseph Township v. Rogers*, 16 Wall. 644 (1872); *English v. Chicot County*, 26 Ark. 454 (1871); *Thompson v. Lee County*, 3 Wall. 327; *Commercial Bank v. Iola*, 2 Dillon C. C. R. 353 (1873); s. c. 20 Wall. 655. "It is well settled, that a municipal corporation, in order to exercise the power of becoming a stockholder in a railroad corporation, must have such power *expressly conferred* upon it by a grant from the legislature; and that even the *power*

Accordingly, where a city was, by charter, specifically authorized to construct wharves, docks, piers, water-works, works for lighting the city, &c., and was also authorized upon certain conditions to create a debt, this was considered to mean a debt for some of these specified purposes, and not to empower the corporate authorities to issue bonds to aid in the construction of a railroad.<sup>1</sup> So there is no

*to subscribe for such stock does not carry with it the power to issue negotiable bonds in payment for the subscription, unless the power to issue such bonds is expressly or by reasonable implication conferred by statute.*" *Blatchford, J.*, in *Kelley v. Milan*, 127 U. S. 139, citing *Pulaski v. Gilmore*, 21 Fed. Rep. 870; *Milan v. Tennessee Central R. R.*, 11 Lea, 330; *Marsh v. Fulton County*, 10 Wall. 676; *Wells v. Supervisors*, 102 U. S. 625; *Ottawa v. Carey*, 108 U. S. 110; *Davess County v. Dickinson*, 117 U. S. 657.

It is also held in this case (*Kelley v. Milan, supra*) that where the power to subscribe for railroad stock and to issue bonds therefor is wanting, an agreement made by the mayor of the municipality, by which a decree recognizing the validity of the bonds is entered, is ineffectual for that purpose. More fully on this point see *post*, chap. xiv. "No lawyer doubts that a borough can only subscribe to a railroad when expressly authorized by law." *Black, C. J.*, in *Sharpless' Case*, cited *Pennsylvania Railway Co. v. Philadelphia*, 47 Pa. St. 189. A railroad is such a "road" as is embraced in the terms of a charter by which the common council of a city were authorized "to take stock in any chartered company for making roads to said city." *Railroad Co. v. Evansville*, 15 Ind. 395 (1860); *Aurora v. West*, 9 Ind. 74; *post*, chap. xiv., Contracts. The legislature may, before (*Aspinwall v. Daviess County*, 22 How. 364), if not, indeed, after the subscription is made, but before it is paid for, annul the proceeding and authorize the municipal corporation to withdraw the subscription and release its right to the stock. *People v. Coon*, 25 Cal. 635. Extent of legislative power. *Ante*, chap. iv. Text approved. *Jacksonport v. Watson*, 33 Ark. 704.

Authority to *subscribe for stock in a railroad company* held not to carry with

it the implied power to issue bonds therefor. *Wells v. Supervisors*, 102 U. S. 625; *Claiborne County v. Brooks*, 111 U. S. 400; *Norton v. Dyersburg*, 127 U. S. 160; *Kelley v. Milan*, 127 U. S. 139 (but holding that the power to issue bonds may be conferred by a reasonable implication from the power granted), *ante*, secs. 123, 124, 127; *post*, sec. 507 *et seq.* Nor does a grant of power to appropriate money to aid a railroad, with a provision directing a levy of taxes to meet the appropriation, include power to issue bonds. *Concord v. Robinson*, 121 U. S. 165; *Wells v. Supervisors*, 102 U. S. 625.

<sup>1</sup> *Lafayette v. Cox*, 5 Ind. (Port.) 38 (1854). As to rights of bondholders, however, see *post*, ch. xiv. on Contracts, and decisions in the national and State courts, there cited. Power *in general* to the city council of Charleston, by the charter of 1783, to pass, *inter alia*, "every other by-law as shall appear to the city council requisite and necessary for the security, welfare, and convenience of said city," was held by the Court of Errors to authorize the city to subscribe to the stock of railroad companies within or without the State. *Copes v. Charleston*, 10 Rich. (S. C.) Law, 491 (1857); see *City Council v. Baptist Church*, 4 Strob. Law, 306, 308, for preamble to the charter of Charleston. There can be little doubt that this is pressing the constructive powers of the corporation to an unwarrantable extent.

*Construction of special acts or charters held to give power to take stock and issue bonds.* *Meyer v. Muscatine*, 1 Wall. 384 (1863); *Curtis v. Butler County*, 24 How. 435; *Gelpcke v. Dubuque*, 1 Wall. 220; *City and County of St. Louis v. Alexander*, 23 Mo. 483; *Railroad Co. v. Otoe County*, 1 Dillon C. C. 338 (1871); *Rogers v. Burlington*, 3 Wall. 654 (compare *Chamberlain v. Burlington*, 19 Iowa, 395); *Fosdick v. Perrysburg*, 14 Ohio St. 472;

power in a municipal corporation (even supposing it to be competent for the legislature to confer such power), as incidental to the usual grants of municipal authority, to take stock in a *manufacturing company* located in or near the corporation,<sup>1</sup> or to aid or engage in other enterprises, essentially private.<sup>2</sup>

§ 162 (107). **Effect of Special Power on existing Charter Limitations of the Taxing Power.** — Whether *special authority* to a municipality to borrow money to pay for stock subscribed to a railway company will *impliedly repeal, pro tanto, existing charter limitations upon the rate of taxation*, is a question depending upon construction, and in relation to which the courts have differed. But the strong inclination of the Supreme Court of the United States seems to be in favor of that construction which restricts such limitations to the exercise of the power of taxation in the ordinary course of municipal action.<sup>3</sup>

Goshorn v. County, 1 West Va. 308; Taylor v. Newberne, 2 Jones (N. C.) Eq. 141; Caldwell v. Justices, 4 Ib. 323; People v. Spencer, 55 N. Y. 1 (1873); Decker v. Hughes, 68 Ill. 33 (1873); People v. Pueblo Co., 2 Col. 360 (1875); English v. Chicot Co., 26 Ark. 454 (1871); distinguishing Seybert v. Pittsburgh, 1 Wall. 272; Veeder v. Lima, 19 Wis. 280 (1865). The opinion of Dixon, C. J., contains an interesting discussion of the questions presented by that case.

*Construction of acts held not to grant power to subscribe for stock and issue bonds.* Kelley v. Milan, 127 U. S. 139; Norton v. Dyersburg, 1b. 160.

<sup>1</sup> Cook v. Manufacturing Co., 1 Sneed (Tenn.), 698 (1854); Com. Nat. Bank v. Iola, 2 Dillon C. C. R. 353 (1873).

<sup>2</sup> Clark v. Des Moines, 19 Iowa, 199 (1865); Hanson v. Vernon, 27 Iowa, 28; Cooley, Const. Lim. 212. A city corporation cannot subscribe for stock in a *steamship line* without express legislative authority. Pennsylvania Railroad Co. v. Philadelphia, 47 Pa. St. 189; and since the new Constitution of Pennsylvania (art. xi. sec. 7, Amendment to Constitution, 1857, *supra*, sec. 157, note), the legislature cannot give that power. Where a charter recited its purpose to delegate to the city authorities power to make such ordinances as the "contingencies, or the local circumstances" of the corporation might re-

quire, and gave "full power and authority to make such assessments on the inhabitants of the city, or those who hold taxable property therein, for the safety, benefit, and advantage of the city, as shall appear to them expedient," the court were of opinion that the city might assess a tax upon the real estate within the corporation for the purpose of constructing a canal "for *manufacturing purposes*, and for the better securing an abundant supply of *water for the city*," and if it could not, yet that it was competent for the legislature, as it did by a subsequent act, to adopt and confirm the action of the city in passing such an ordinance. Frederick v. Augusta, 5 Ga. 561 (1848). Aside from the curative act, the correctness of the view taken by the court is by no means clear. *Ante*, secs. 79, 158, 159.

<sup>3</sup> Butz v. Muscatine, 8 Wall. 575 (1869). *Contra*, Clark v. Davenport, 14 Iowa, 494; Learned v. Burlington, 2 Am. Law Reg. (N. S.) 394, and note; Leavenworth v. Norton, 1 Kan. 432; Burnes v. Atchison, 2 Kan. 454. And see Commonwealth v. Pittsburgh, 34 Pa. St. 496; Amey v. Allegheny City, 24 How. (U. S.) 364; Fosdick v. Perryburg, 14 Ohio St. 472; Cumberland v. Magruder, 34 Md. 381 (1871); see Assessors v. Commissioners, 3 Brews. (Pa.) 333; State v. Guttenburg, 39 N. J. L. 660. In Quincy v. Jackson, 113 U. S.

§ 163 (108). **Power to issue Bonds absolutely essential; Conditions precedent to its Exercise must be complied with.** — If the power to issue bonds in aid of railway and other like public enterprises does not exist, they are void into whosoever hands they may come.<sup>1</sup> The power, when it has been conferred, to aid or engage in extra-municipal enterprises, being extraordinary in its nature and burdensome to the citizen, *must* (except as modified by the doctrine of estoppel in favor of the *bona fide* holders of the securities) *be strictly pursued* according to the terms and conditions of the grant conferring it. Thus, under an act authorizing town officers to borrow money upon the credit of the town, and to pay it over to a railroad corporation, to be expended by it "in grading and constructing a railroad," taking in exchange its stock at par, it is not within the power of municipal officers to make a direct exchange of the bonds of the town, even for an equal nominal amount of stock, as this leaves it in the power of the railroad corporation to sell such bonds at a discount.<sup>2</sup> So in a case where a county had by the legislative act no authority to issue its bonds to the railroad company unless upon the sanction of a previous vote after *thirty days' notice of the election* to be held for that purpose, the Supreme Court of Illinois

332, the Supreme Court of the United States held that a power to levy taxes, to pay debts, and for general expenses, not exceeding fifty cents on each hundred dollars, related only to debts and expenses for the ordinary purposes of the city, and not to such as were incurred under a special authority, — as, a debt incurred by subscribing to the stock of a railroad under authority of a statute which was construed to confer authority to make a levy, for the payment of the debt, in excess of the limitation above recited. This case distinguished from *United States v. Macon County*, 99 U. S. 582; for a statement of which see *post*, sec. 851.

<sup>1</sup> *Marsh v. Fulton County*, *supra*; *Allen v. Louisiana*, 103 U. S. 80; *Com. Bank v. Iola*, 2 Dillon, 353 (1873), affirmed in Supreme Court, 20 Wall. 655; *Sav. Assoc. v. Topeka*, 3 Dillon, 376 (1874); *Weismer v. Village of Douglass*, 64 N. Y. 91 (1876); *Clay v. County*, 4 Bush (Ky.), 154. See further, chapter xiv. on Contracts, *post*, where the rights of *bona fide* holders of such instruments are considered at length. *Dunovan v. Green*, 57 Ill. 63; *Lynde v. Winnebago County*,

16 Wall. 6 (1873); *James v. Milwaukee*, 16 Wall. 159 (1872); *post*, sec. 553; *Police Jury v. Britton*, 15 Wall. 566; *Gould v. Paris*, 68 Tex. 511.

<sup>2</sup> *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, *Id.* 439, 456. In the case last cited, *Selden*, J., p. 460, remarks: "In the present case the only authority given (to the town) by the act is to borrow upon the bonds of the town. No express power to sell the bonds is given, and no such power, can, I think, be implied. To borrow money, and to give a bond or obligation for it, and to sell a bond or obligation for money, are by no means identical transactions. In the one case the money and the bond would, of course, be equal in amount; in the other they might or might not be equal." Whether such a defence would be available against a *bona fide* holder of the bonds was not determined. See *post*, sec. 526. As to these cases, see chapter xiv. on Contracts, *post*. See *Woods v. Lawrence County*, 1 Black, 386; *Moran v. Miami County*, 2 Black, 722. That such a defence is not available against a holder for value, see *post*, sec. 515 *et seq.*

held, in a *direct proceeding against the county to enjoin it from issuing its bonds*, that although there was an election at which a majority voted in favor of the subscription, yet the failure to give the thirty days' notice was a fatal defect, and the issue of the bonds was restrained.<sup>1</sup>

**§ 164. Estoppel in favor of bona fide Holder of Negotiable Bonds.**—It may be observed in conclusion that *the Supreme Court of the United States*, in the municipal railway aid bond cases referred to in a subsequent chapter,<sup>2</sup> have held the doctrine, in favor of the innocent holders for value of such securities, that *the municipality may be estopped by recitals in the bonds*, by the subsequent levy of taxes to pay interest thereon, and by retaining the stock which was received in exchange for the bonds or purchased with their proceeds, to set up in defence a non-compliance with preliminary conditions.<sup>3</sup> This is a doctrine, however, which is asserted for the protection of such holders, and has ordinarily no place in controversies which arise *before the issue of the bonds*, between the taxpayers or municipality on the one hand, and the company on the other. In such cases the sound doctrine is that compliance with all substantial or material conditions is essential.<sup>4</sup>

<sup>1</sup> *Harding v. Rockford, &c. Railroad Co.*, 65 Ill. 90 (1873).

In delivering the opinion of the court, *Thornton, J.*, remarks: "Such municipalities were not created with the view to engage in commerce, or to aid in the construction of railways, but for governmental purposes only. When they exercise the functions given by the statutes under consideration, the powers granted must not only be clearly conferred, but strictly pursued. If the mode prescribed for carrying into effect the right to issue bonds is not complied with in all material matters, then the bonds should not be issued, and thus the taxpayer will be exempt from the imposition of illegal taxes, and a grievous burden upon his property. These principles have been so elaborately discussed and fully settled by this court, that we need only refer to some of the cases. *The People v. Tazwell County*, 22 Ill. 147; *Fulton County v. The Mississippi & Wabash Railroad Co.*, 21 Ill. 338; *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562; *People v. Logan Co.*, 63 Ill. 384; *Williams v. Roberts*, 88 Ill. 11; *People v. Oldtown*, 88 Ill. 202; *Clarke v. Board*,

&c., 27 Ill. 307; *Force v. Batavia*, 61 Ill. 99; *Harding v. R. R. I. & St. L. R. R. Co.*, 65 Ill. 90; *Lippincott v. Pana*, 92 Ill. 24; *Gaddis v. Richland Co.*, 92 Ill. 119; *Supervisors of Schuyler Co. v. The People*, 25 Ill. 181; *Supervisors of Hancock County v. Clark*, 27 Ill. 305; *Marshall County v. Cook*, 38 Ill. 44; *Wiley v. The Town of Brimfield*, 59 Ill. 306; *People v. Cass Co.*, 77 Ill. 438 (1875)."

If aid has been conditionally voted, the condition must be complied with before the company can demand the aid. *Railroad Co. v. Hartford*, 58 Me. 23; *Cowdrey v. Town of Canadea*, 16 Fed. Rep. 532; *Rich v. Town of Mentz*, 19 Fed. Rep. 725.

<sup>2</sup> *Post*, chap. xiv. on Contracts, sec. 511 *et seq.*

<sup>3</sup> *Post*, sec. 519 *et seq.*

<sup>4</sup> *Jackson Co. v. Brush*, 77 Ill. 59 (1875).

The Supreme Court of Connecticut, under peculiar circumstances, held the town voting aid to a railroad company *estopped* to show, as against the *railroad company* (equitable rights of material-men and contractors having intervened), that

the vote at the town meeting had not been taken by ballot as required by the act of the legislature, but by a division of the house, without ballot. *New Haven, &c. Railroad Co. v. Chatham*, 42 Conn. 465 (1875). This case pronounced exceptional, *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, citing the foregoing. See also *Douglas v. Chatham*, 41 Conn. 211. In submitting the question to vote whether a township will take stock in a railroad company, the township has the right to impose such conditions in regard thereto as it deems proper; and such conditions when imposed are binding, and the company will have no right to the subscription, or to compel the issue of the bonds, until the conditions are fully performed on its part, if the authorities have a discretion. *People v. Holden*, 91 Ill. 446. If the county authorities have a discretion to subscribe on a vote without conditions, the annexing of conditions will not deprive them of its exercise. *People, ex rel., &c. v. County Board of Cass County*, 77 Ill. 438 (1875).

Except in controversies with *bona fide* bondholders for value, the State courts have generally and properly, held, that the power of a municipality to issue railroad aid bonds is dependent upon a strict compliance with the statute authorizing the issue of such bonds; and that when the power is conditional on a prior vote of the electors the statutory notice must be given. *People v. Jackson County*, 92 Ill. 444; *Harding v. R. R. I. & St. L. R. R. Co.*, 65 Ill. 90 (1872); *People v. Waynesville*, 88 Ill. 469, in which it is held that one submission exhausts the power, and a

subsequent one is *ultra vires: quere*. A subscription cannot be made to a division of a road. *McWhorter v. People*, 65 Ill. 290 (1872). *Power to issue upon compliance with conditions cannot be delegated*. *Jackson County v. Brush*, 77 Ill. 59 (1875); *People v. Waynesville, supra*; *People v. Harper* (vote need not fix time for bonds to run), 67 Ill. 62 (1873). *Cannot make a contract with railroad company for subscription before election*. *People v. Cass County*, 77 Ill. 438 (1875). *Submitting two propositions at same election*. *Marshall v. Silliman*, 61 Ill. 218 (1871); see also *Garrigus v. Park County*, 39 Ind. 66 (1872); *State v. Roggen*, 22 Neb. 118. Conditions, effect of non-observance. *Alley v. Adam County*, 76 Ill. 101 (1875). *Voting on unauthorized proposition*. *Cairo, &c. Co. v. Sparta*, 77 Ill. 505 (1875). *Election must be held according to the law governing it*. *The People, &c. v. Supervisor, &c.*, 67 Ill. 57 (1873). See also the following cases: *Wright v. Bishop*, 88 Ill. 302; *Edwards v. People*, 88 Ill. 340; *Williams v. Roberts*, 88 Ill. 11; *People v. Clayton*, 88 Ill. 45; *People v. Oldtown*, 88 Ill. 202; *Yarish v. R. R. Co.*, 72 Iowa, 556. *What is a majority vote*. *McDowell v. Const. Co.*, 96 N. C. 514; *State v. Bechell*, 22 Neb. 158; *ante*, sec. 44, note and cases.

The reader is referred to chap. xiv. on Contracts, *post*, where the subject of *Municipal Bonds* is considered at large, with special reference to the decisions of the Supreme Court of the United States, which, generally speaking, are more favorable on certain points to the *bona fide* holders of such bonds than those of the State courts.



## CHAPTER VII.

## DISSOLUTION OF MUNICIPAL CORPORATIONS AND REPEAL OF CHARTERS.

*In England.*

§ 165 (109). **How dissolved.** — In England, a municipal corporation may be dissolved, —

1. By *an act of parliament*, this power being a necessary consequence of the omnipotence of that body in all matters of political institution.<sup>1</sup> The king may, by his prerogative, *create, but cannot dissolve or destroy* a corporation; may grant privileges, but when vested, cannot take them away.<sup>2</sup>

It has there often been declared that a municipal corporation may also be dissolved, —

2. By *the loss of an integral part*, or the loss of all or of the majority of the members of any integral part, without which it cannot transact its business, unless the parts that remain have the right to act or to restore the corporate succession.<sup>3</sup>

<sup>1</sup> Co. Litt. 176, note; 2 Kyd, 447; *Rex v. Amery*, 2 Term R. 515; Glover, 408; Angell & Ames, chap. xxii. sec. 767; 2 Kent Com. 305; County Comm'rs v. Cox, 6 Ind. 403; *State v. Trustees, &c.*, 5 Ind. 77; *ante*, sec. 32, as to distinction between Royal and Parliamentary Corporations.

<sup>2</sup> *Ante*, secs. 32, 35; *Rex v. Amery, supra*; Regents of University v. Williams, 9 Gill & Johns. 365, 409 (1838). In this case, *Buchanan, J.*, in substance, observes: The crown may create, but cannot, at pleasure, dissolve a corporation, or, without its consent, alter or amend its charter. Parliament may do this; but, restrained by public opinion, it has not undertaken to dissolve any private corporation since the time of Henry VIII., so that the power to do so rests wholly in theory. In 1783 a bill was proposed to remodel the East India Company. Lord *Thurlow* opposed it as subversive of the law and constitution, and, in strong, nervous language,

declared it to be “an atrocious violation of private property, which cut every Englishman to the bone.”

<sup>3</sup> *Wille. on Corp.* 325, chap. vii. This chapter contains an interesting discussion of the question of dissolution, and it would seem that the author, notwithstanding the occasional judgments and the many and broad *dicta* in the books, doubts whether there can be an *actual and total dissolution* of a municipal corporation, either by the loss of an integral part, or by surrender, or by forfeiture. But see 2 Kyd, chap. v.; Glover, chap. xx.; Angell & Ames, sec. 769; and particularly *Rex v. Morris and Rex v. Stewart*, 3 East, 213; 4 East, 17. *Integral parts defined. Ante*, sec. 35. In *Rex v. Passmore*, 3 Term R. 241, where the subject was much considered, Lord *Kenyon* observed, “When an integral part of a corporation is gone, without whose existence the functions of the corporation cannot be exercised, and the corporation has no manner of supplying the integral

3. By a *surrender of the franchise of being a corporation to the crown*, whose acceptance is necessary; and to be effectual the surrender must be enrolled in chancery. The power to surrender has been much questioned; the argument in favor of it being, that since by royal grant and acceptance a corporation may be created, so by surrender and acceptance it may be annulled. It is admitted, however, that a corporation created or confirmed by parliament or statute cannot dissolve itself by a surrender of its charter or franchise.<sup>1</sup>

4. By *forfeiture of its charter*, through negligence or abuse of its franchise, judicially ascertained by proceedings in *quo warranto* or *scire facias*. This mode of dissolution proceeds upon the doctrine, well settled as to *private* corporations, both in England and in this country, and perhaps settled in that country, also, as respects the old municipal corporations when created by royal charter, that there is a tacit or implied condition annexed to the grant of every act or charter of incorporation that the grantees shall not neglect to use and shall not misapply the powers granted, and that if they do, the condition is broken upon which the corporation was created, and the corporation thereupon ceases to exist. And in the cases in the time of Charles II. it was held that the corporation might forfeit its franchise by reason of the *neglect or misconduct of its officers*.<sup>2</sup>

part, the corporation is dissolved as to *certain purposes*. But the king may renovate either with the old or new corporators."

The leading authorities respecting the effect of the *loss of an integral part* are, 1 Rol. Abr. 514; *Regina v. Bewdley*, 1 P. Wms. 207; *Banbury's Case*, 10 Mod. 346; *Rex v. Tregony*, 8 Mod. 129; *Colchester v. Seaber*, 3 Burr. 1870; s. c. 1 Wm. Bl. 591, which, however, is said not to be a case of the loss of an integral part, but of magistrates. *Grant Corp.* 305, note; *Rex v. Passmore*, 3 Term R. 241. The foregoing cases are succinctly stated by Mr. Kyd, 2 Corp. chap. v. See, also, Mayor, etc. of *Colchester v. Brooke*, 7 Queen's B. 383, and Mr. Justice *Campbell's* learned opinion in *Bacon v. Robertson*, 18 How. (U. S.) 480 (1855); *infra*, sec. 169, note; *People v. Wren*, 4 Scam. (5 Ill.) 275, citing *supra* and relying on *Colchester v. Seaber*, *supra*; *Smith's Case*, 4 Mod. 53; *Smith v. Smith*, 3 Desaus. (S. C.) 557; *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130; chapters on Corporate Officers and Corporate Meetings, *post*.

<sup>1</sup> *Rex v. Osbourne*, 4 East, 326; *Rex v. Miller*, 6 Term R. 277; Willc. 332, pl. 861; *Howard's Case*, Hutt. 87; *Grant on Corp.* 306, 308; *Thicknesse v. Canal Co.*, 4 M. & W. 472.

<sup>2</sup> Black. Com. 485; 2 Kyd, 447; Willc. chap. vii. 325 *et seq.*; *Taylor's of Ipswich*, 1 Rol. 5; *Rex v. Grosvenor*, 7 Mod. 199; *Smith's Case*, 4 Mod. 55, 58; s. c. 12 Mod. 17; *Skin*. 311; 1 Show. 278; *Rex v. Saunders*, 3 East, 119; Mayor, &c. of *Lyme v. Henley*, 2 Cl. & F. 331; *Rex v. Kent*, 13 East, 220; *Priestly v. Foulds*, 2 Scott N. R. 205, 225; *Attorney-General v. Shrewsbury*, 6 Beav. 220. See reference *arguendo* to subject of forfeiture of municipal charter, in *Whalen v. Macomb*, 76 Ill. 49 (1875). The earlier American cases relating to the *dissolution of private corporations* by forfeiture of their charters; what will constitute sufficient ground of forfeiture; and the mode of proceeding to ascertain and enforce the forfeiture, are collected, and the result very clearly and satisfactorily stated, in *Angell & Ames on Corporations*, chap. xxii. See, also, 2 Kent Com. 305.

*In the United States.*

§ 166 (110). **How dissolved.** — These *various modes of dissolution*, except the first, are believed by the author to be inapplicable to municipal corporations in this country as they are generally created and constituted. Here it is the *people* of the locality who are erected into a corporation, not for private, but for public or *quasi* public purposes. The corporation is mainly and primarily if not wholly an instrument of government. The officers do not constitute the corporation, or an integral part of it. The existence of the corporation does not depend upon the existence of officers. The qualified voters or electors have, indeed, the right to select officers, but such officers are the mere agents or servants of the corporation, and hence the doctrine of a dissolution by the loss of an integral part has, in such cases, no place. If all the people of the defined locality should wholly remove from or desert it, the corporation would, from necessity, be suspended or dormant, or perhaps entirely cease; but the mere neglect or mere failure to elect officers will not *dissolve* the corporation, certainly not while the right or capacity to

*Private corporations may lose their legal existence*, 1. By the act of the legislature; 2. By the death of all their members; 3. By a forfeiture of their franchises, and 4. By a surrender of their charter. No other mode of dissolution is anywhere alluded to. *Boston Glass Manuf. v. Langdon*, 24 Pick. 49, 52, *per Morton, J.*; *Commonwealth v. Union Ins. Co.*, 5 Mass. 230, 232; *Riddle v. Locks and Canals*, 7 Mass. 169; *School v. Canal, &c. Co.*, 9 Ohio, 203; *Canal Co. v. Railroad Co.*, 4 Gill & Johns. 1; *Vincennes University v. Indiana*, 14 How. 268. Legislative power under the head of various constitutional provisions concerning the division, annexation and consolidation, modification of charter, dissolution, and nature of corporate property as affecting the rights of creditors and others. See 21 *American Law Review*, 14. The *dissolution of a private corporation* by authorized legislative act or judicial sentence, does not impair the obligation of a contract any more than the death of a private person impairs the obligation of his contract. This doctrine was based by the court (8 Pet. 281, cited, *infra*), upon two grounds: *First*, the obligation survives, and the

creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers; *second*, every creditor is presumed to contract with reference to a possibility of the dissolution of a corporate body. *Mumma v. Potomac Co.* (holding that on *sci. fa.* a judgment could not be revived, or costs adjudged, against a corporation legislatively annulled), 8 Pet. (U. S.) 281 (1834). Of *dissolution by act of the legislature* and its effect on the corporation, its property and creditors, see the recent case decided by the Court of Appeals of New York, in reference to the surface railway on Broadway in New York city. *People v. O'Brien*, 111 N. Y. 1 (1888). *Ante*, chap. iv., sec. 68a *et seq.*

Mr. Grant, in his work on Corporations, considers it doubtful whether an *information* in the nature of *quo warranto* will lie, in England, against parliamentary or statute corporations, for usurping powers not given, or misusing those conferred (*Corp.* 307, 308; *Rex v. Nicholson*, 1 Str. 299); but in this country, the law as to private corporations is indisputably settled, that in such cases an *information* of this kind may be brought.

elect remains.<sup>1</sup> In this respect municipal corporations resemble ordinary private corporations, which exist *per se*, and consist of the stockholders who compose the company. The officers are their agents or servants, but do not constitute an integral part of their corporation, the failure to elect whom may suspend the functions, but will not dissolve the corporation.<sup>2</sup>

§ 167 (111). **Surrender of Charter.** — Since all of our charters of incorporation come from the legislature,<sup>3</sup> a municipal corporation cannot dissolve itself by a *surrender* of its franchise. The State creates such corporations for *public* ends, and they will and must continue until the legislature annuls or destroys them, or authorizes it to be done. If there could be such a thing as a surrender, it would, from necessity, have to be made to the legislature, and its acceptance would have to be manifested by appropriate legislative action.<sup>4</sup>

<sup>1</sup> Willc. chap. vii. and observations at pp. 325, 326, 327, pl. 852; *Colchester v. Seaber*, 3 Burr. (1866); *Colchester v. Brooke*, 7 Queen's B. 383; *Rex v. Passmore*, 3 Term R. 241; *Grant on Corp.* 308; *Bacon v. Robertson*, 18 How. 480; *Lowber v. Mayor, &c. of New York*, 5 Abb. Pr. 325; *Clarke v. Rochester*, 5 Abb. Pr. 107; *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130 (1871). That the *failure to elect officers does not dissolve*, while the capacity to elect remains, see, also, *Philips v. Wickam*, 1 Paige Ch. 590; *Commonwealth v. Cullen*, 1 Harris (Pa.), 133; *President v. Thompson*, 20 Ill. 197; *Rose v. Turnpike Co.*, 3 Watts (Pa.), 46; *People v. Wren*, 4 Seam. (5 Ill.) 275; *Brown v. Insurance Co.*, 3 La. An. 177; *Welch v. Ste. Genevieve*, *supra*; *Green Township*, 9 Watts & S. (Pa.) 22; *Vincennes University v. Indiana*, 14 How. 268; *Muscantine Turnverein v. Funck*, 18 Iowa, 469; *Schriber v. Langdale*, 66 Wis. 616. In *Lea v. Hernandez*, 10 Tex. 137 (1853), it appeared that a place was incorporated as a town prior to 1848, that in the year just named the legislature passed an act to incorporate the town, and that no election for officers nor any organization was had thereunder for three years and down to the commencement of the action, nor were there any officers *de facto* acting. The court held that the failure to elect officers operated to dis-

solve the corporation, there being no express provision of the charter to the contrary. But no authorities are cited and no reasons given, and the conclusion that an actual dissolution of the corporation resulted from a failure to elect, is believed to be unsound.

The existence of a municipal corporation is not considered to be interrupted in consequence of a change in the council. *Elmendorf v. Ewen*, 2 N. Y. Leg. Obs. 85; *Elmendorf v. Mayor, &c. of New York*, 25 Wend. 693. Further, see chapters relating to Corporate Officers and Corporate Meetings, *post*.

<sup>2</sup> Angell & Ames on Corp. sec. 771, and cases there cited; *People v. Fairbury*, 51 Ill. 149 (1869).

<sup>3</sup> *Ante*, secs. 37, 43, 54.

<sup>4</sup> "The creation of a corporate franchise is an attribute of sovereignty to be exercised solely by the supreme power of the State. Such franchise being amenable only to the power of its creation, it follows that this power alone can question the legality of its existence, by such proceedings as in its wisdom it may adopt." *Bonner, J. Brennan v. Bradshaw*, 53 Tex. 330. Municipal corporations incorporated under a general act, containing provisions for their dissolution, can be disincorporated in the method prescribed in the act. *Hambleton v. Town of Dexter*, 89 Mo. 183.

§ 168 (112). **Forfeiture of Corporate Existence.** — The doctrine of a *forfeiture of the right to be a corporation* has also, it is believed by the author, no just or proper application to our *municipal* corporations.<sup>1</sup> If they neglect to use powers in which the public or individuals have an interest, and the exercise of such powers be not discretionary, the courts will interfere and compel them to do their duty.<sup>2</sup> On the other hand, acts done beyond the powers granted are void.<sup>3</sup> If private rights are threatened or invaded, the courts will, as hereafter shown, restrain or redress the injury.<sup>4</sup> With what surprise would we hear of a proceeding to forfeit the charter of the city of New York or Chicago because of the misconduct of its officers, or because the common council, as in the famous case against the city of London, were assuming to exercise unauthorized powers by ordaining an oppressive by-law. In short, unless otherwise specially provided by the legislature, the nature and constitution of our municipal corporations, as well as the purposes they are created to subserve, are such that they can, in the author's judgment, only be dissolved by the legislature, or pursuant to legislative enactment.<sup>5</sup> They may become inert or dormant, or their functions may be suspended, for want of officers or of inhabitants; but *dissolved*, when created by an act of the legislature, and once in existence, they cannot be, by reason of any default or abuse of the powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision.

It is also held, in accordance with the text, that *franchises* granted to municipal corporations *cannot be surrendered* by them. A city owning the franchise of collecting toll on freight passing through the channel of a river, contracted with a firm that, in consideration of city bonds delivered, the firm should construct and maintain the channel, collect tolls, and, with the proceeds, pay off the bonds. In answer to an information in the nature of *quo warrant* requiring the city and the firm to show cause why they assumed authority to collect tolls, the city disclaimed all right to collect them, and asked that the proceeding be dismissed as to it. *Held*, that the city could not be divested of so valuable a right without a hearing in court, and was a necessary party to the proceeding. *Willie*, C. J., said :

"It is extremely doubtful whether a municipal corporation can, by a mere disclaimer, surrender a franchise in which not only the corporation, but a large portion of the State's population residing within the city's limits, as well as of the commercial world, are interested." *Morris v. State*, 65 Tex. 53.

<sup>1</sup> See *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130 (1871), *arguendo*.

<sup>2</sup> *Ante*, chap. v. sec. 98; *post*, chapter on Mandamus.

<sup>3</sup> *Ante*, sec. 89, and notes.

<sup>4</sup> See chapter xxii. on Remedies to prevent, correct, and redress Illegal Corporate Acts, *post*, secs. 906-934.

<sup>5</sup> *Meriwether v. Garrett*, 102 U. S. 472 (1880); *Mobile v. Watson*, 116 U. S. 289 (1885). More fully see, *ante*, chap. iv. secs. 57-69, and *post*, secs. 169 *a*, 170.

§ 169 (113). **Effect of Dissolution at Common Law.** — At common law, a corporation, of whatever kind, which was wholly dissolved, was considered to be civilly dead; and the effect was that their lands reverted to the grantor or his heirs, and the debts of the corporation, whether owing to or by it, were extinguished. Leases made by the corporation would cease because of the reversion of the lands to the original owners; and, for the same reason, lands given to or held by the corporation for charitable purposes would be lost.<sup>1</sup> These inconveniences and results are so disastrous that the English courts, as the more recent cases before cited will show, have doubted and limited, although they may not have overthrown, the doctrine that municipal corporations may be totally dissolved. These consequences of a dissolution of a corporation attached to all corporations, eleemosynary, municipal, and private; and since this doctrine has, in this country, been generally rejected as to private corporations organized for pecuniary profit, and rests upon no foundation in reason or justice, it may perhaps safely be affirmed that it would not, on full consideration, be applied to the dissolution of a municipal corporation by an absolute and unconditional repeal of its charter, or to the case where the charter of such a corporation is forfeited, if that may be done, by judicial sentence. Therefore, the leases of a corporation would not be disturbed by its dissolution, nor would its lands held in fee revert, nor would those held in trust for charitable purposes be lost, since equity would supply trustees.<sup>2</sup>

<sup>1</sup> Co. Litt. 13; 1 Lev. 237; Knight v. Wells, 1 Lut. 519; Rex v. Sanders, 3 East, 119; Attorney-General v. Gower, 9 Mod. 226; 1 Rol. Abr. 816; Colchester v. Seaber, 3 Burr. (1866); Willc. 330, pl. 858; 2 Kyd, 516; Rex v. Passmore, 3 Term R. 247; Grant, Corp. 305; Colchester v. Brooke, 7 Queen's B. 383; Commonwealth v. Roxbury, 9 Gray, 510, note.

<sup>2</sup> Ante, secs. 64, 80; chapters on Corporate Boundaries and Property, post. Bacon v. Robertson, 18 How. (U. S.) 480 (1855); Girard v. Philadelphia, 7 Wall. 1 (1868); Mumma v. Potomac Co., 8 Pet. 281 (1834); Curran v. Arkansas, 15 How. (U. S.) 312; 2 Kent, 307, note; Angell & Ames, Corp. 779 a; Coulter v. Robertson, 24 Miss. 278; County Comm'rs v. Cox, 6 Ind. 403; State v. Trustees, &c. 5 Ind. 77; Vincennes University v. Indiana, 14 How. 268; Owen v. Smith, 31 Barb. 641; Commonwealth v. Roxbury, 9 Gray, 510, note. See also *Broadway Railway Case*, decided by the Court of Appeals

of New York, 1888. People v. O'Brien, 111 N. Y. 1. Ante, sec. 68 a.

The general subject of the effect of a dissolution of a private corporation is extensively discussed by Mr. Justice Campbell, in Bacon v. Robertson, supra. The case was a bill in chancery by the stockholders of a bank, whose charter had been judicially forfeited, for a distribution of the surplus after the payment of the debts, and the relief was granted. The Supreme Court of the United States seemed to be of opinion that, upon the general principles of equity jurisprudence, and without statutory aid, the surplus of the assets of a corporation for pecuniary profit, after the payment of debts and expenses, belonged to the shareholders; that the creditor of such a corporation, dissolved or declared forfeited by judgment upon *quo warranto* or judicial sentence, has, without a statute to that effect, a claim in equity upon the corporate property for the satisfaction of his debt; that lands conveyed to the cor-

§ 169 a. **Effect of Dissolution in this Country.**—The correctness of the prediction which the author ventured in the last section to make, that *the common-law consequences of the dissolution of a corporation would not be applied in this country* to the dissolution of a municipal corporation, has since been adjudged by the Supreme Court of the United States, and by other tribunals. The legislature absolutely repealed the charter of an indebted city, abolished all of the municipal offices therein, and established in the place of the late city government, a new local organization with the means of self-government. The acts which abolished the old and established the new organization made no provision for the payment of debts of the annihilated city corporation, and, in fact, provided that the successor organization should not be liable therefor, and that any taxes raised within the new organization should not be applied for the payment of the debts of the late corporation.

poration in fee and for a full price do not revert, and that the stockholder, as to the surplus after paying the debts, stands upon grounds as high and has claims as irresistible as the creditor before had. The usual consequences of a dissolution, as stated by the text-writers, if correct, which was doubted, were deemed inapplicable to moneyed or trading corporations.

In the course of his admirable opinion, the learned justice observed: "The common law of Great Britain was deficient in supplying the instrumentalities for a speedy and just settlement of the affairs of an insolvent corporation whose charter had been forfeited by judicial sentence. The opinion usually expressed as to the effect of such a sentence was unsatisfactory and questioned. There had been *instances in Great Britain of the dissolution of public or ecclesiastical corporations* by the exertion of public authority, or as a consequence of the death of their members; and parliament and the courts had affirmed, in these instances, that the endowments they had received from the prince or pious founders would revert in such a case." *Stat. de Terris Templariorum*, 17 Edw. II.; Dean and Canons of Windsor, Godb. 211; *Johnson v. Norway*, Winch. 37; Owen, 73; 6 Vin. Abr. 280. What was to become of their personal estate, and of their debts and credits, had not been settled in any adjudicated case, and, as was said by Pol-

lexfen in the argument of the *quo warranto* against the city of London, was, perhaps, "*non definitur in jure.*" (See *ante*, Introductory Chapter, sec. 8.) Solicitor Finch, who argued for the crown in that cause, admitted: "I do not find any judgment in a *quo warranto* of a corporation being forfeited." Treby, on behalf of the city, said: "The dissolving a corporation by a judgment in law, as is here sought, I believe is a thing that never came within the compass of any man's imagination till now; no, not so much as the putting of a case. For in all my search (and upon this occasion I have bestowed a great deal of time in searching), I cannot find that it even so much as entered into the conception of any man before; and I am the more confirmed in it because so learned a gentleman as Mr. Solicitor has not cited any one such case wherein it has been (I do not say adjudged, but) even so much as questioned or attempted; and, therefore, I may very boldly call this a case *primæ impressionis*." The argument of Pollexfen was equally positive.

The power of courts to adjudge a forfeiture so as to dissolve a corporation was affirmed in that case, but the effect of that judgment was not illustrated by any execution, and the courts were relieved from their embarrassment by an act of parliament annulling it. Smith's case, 4 Mod. 53; Skin. 310; 8 St. Trials, 1342. See *ib.* 1042. Nor have the discussions

The Supreme Court of the United States dismissed a bill in equity of a creditor seeking for relief. It decided that the property held by the repealed corporation for public uses, such as public buildings, wharves, fire engines, and, generally, all property held for governmental purposes, could not be subjected to the payment of the debts of the city. It further decided that upon a repeal of its charter such property passed under the immediate control of the State, since the power delegated to the city in that respect had been withdrawn.<sup>1</sup> It also decided that the private property of individuals could not be subjected to the payment of the debts of the city, except through taxation, and that the power of taxation being legislative it could not be exercised otherwise than under the authority of the legislature.<sup>2</sup> As to private property — that is, such as was owned by the municipality, not for public or municipal uses — it would of course be liable to the claims of creditors, but subject thereto, it would be under the control of the legislature.

since the Revolution extended our knowledge upon this intricate subject. The case of *Rex v. Amery*, 2 Term R. 515, has exerted much influence upon text-writers. The questions were, whether a judgment of seizure *quosque* upon a default was final, and if so, whether the king's grant of pardon and restitution would overreach and defeat a charter granting to a new body of men the same liberties, intermediate the seizure and the pardon. The king's bench, relying upon the Year-Book, discovered that it did not support the conclusion drawn from it, and Chief Baron *Eyre* says that "Lord *Coke* had adopted the doctrine too hastily." The discussions upon this case show how much the knowledge of the writ of *quo warranto*, as it had been used and applied under the Plantagenets and Tudors, had gone from the memories of courts and lawyers. 4 Term R. 122 : Tan. on *Quo War.* 24. In *Colchester v. Seaber*, 3 Burr. (1866), where the suit was upon a bond, and the defence was that certain facts had occurred to dissolve the corporation, and that the creditor's claim was extinguished on the bond, Lord *Mansfield* said, "Without an express authority, so strong as not to be gotten over, we ought not to determine so much against reason as that parliament should be obliged to interfere.

The question occurs here, Could parliament interfere? And the answer would be by their authorizing a suit to be brought, notwithstanding the dissolution. These are all cases of municipal corporations where the corporators had no rights in the property of the corporation in severalty."

<sup>1</sup> Substantially the same principles as to the effect of the dissolution of a municipal corporation by a repeal of its charter upon its property rights, are laid down in the opinion of Mr. Justice *Field* in *Broughton v. Pensacola*, 93 U. S. 266 (1876), at pp. 268, 269 ; noted *infra*, sec. 170, note.

<sup>2</sup> *Meriwether v. Garrett*, 102 U. S. 472 (1880). Precisely what the court means by the statement "that the power of taxation is legislative and cannot be exercised otherwise than under the authority of the legislature" remains to be determined in that tribunal. It certainly meant in that case that the power could not be set in motion by a bill in equity. Whether it meant that the power of taxation as a means of paying the debts of the repealed corporation did not survive such repeal and the legislative prohibition of the exercise of such power, can only be known when this precise question arises for judgment.



§ 170 (114). **Rights of Creditors on a Dissolution.** — The rights of creditors of municipal corporations are elsewhere more fully considered.<sup>1</sup> The doctrines of the Supreme Court of the United States may be thus briefly summed up: —

1. The rights of creditors, based upon the obligation of their contracts, are protected by the Constitution of the United States against subsequent legislation impairing the same.

2. It has often been decided, and is the settled doctrine of the Supreme Court, that the remedies subsisting in a State when and where the contract is made and is to be performed, are a part of its obligation, and that any subsequent law of the State which so affects those remedies as substantially to impair and lessen the value of the contract, is forbidden by the Constitution of the United States, and is therefore void. Applying this principle, it is held, that if the municipality agrees, as a part of its contract, that the creditor shall have the right to a special tax, the statute giving this right cannot as to such creditor be repealed, unless there be substituted in its place a remedy legally equivalent in value and efficacy.<sup>2</sup>

3. The legislature in its sympathy with insolvent and repudiating municipalities has sometimes gone so far as absolutely to repeal their charters, and in some form to substitute or authorize new municipal organizations in their place. Instances of such legislation in respect of the cities of Memphis, of Brownsville, of Mobile, and of some other places, are given in the notes to this section. The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private persons. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but where the same, or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old, entitled to its property rights, and subject to its liabilities.

4. As to the mode of enforcing such liabilities difficult questions have arisen, some of which cannot at this time be said to be clearly settled. It may, however, we think, be considered as definitively determined by the Supreme Court, that the levy and collection of

<sup>1</sup> *Ante*, chap. iv. ; *post*, secs. 853 *et seq.*, 861 *a*–861 *c.*

<sup>2</sup> *Seibert v. Lewis*, 122 U. S. 284 (1886), noted more fully *post*, sec. 854, stands as the type of this class of cases, — that is, where the corporate existence of

the indebted municipality is left untouched by the legislature, but the subsequent legislation impairs the creditor's remedy as it existed at the date of the contract. Many other cases to the same effect are cited in the notes to this section.

taxes cannot be enforced in or by the Circuit Courts exercising equity jurisdiction, but only by appropriate remedies in the court of law, chief among which is the remedy by *mandamus*.<sup>1</sup>

5. If the legislature repeals the charter of the debtor corporation and dissolves it, and makes no provision for its debts, and it has no private property subject to execution, and there is no resource for the payment of such indebtedness but taxation, then if no new or successor corporation be organized, and if no instrumentalities of the taxing power remain subject to the process of the courts, the rights of creditors are, in fact, impaired or destroyed, and it would seem that the courts are in such case practically powerless to prevent this result; and that the creditor's only remedy, which he would be very apt under the circumstances to consider illusory, is to appeal for relief to the legislative department of the government, that is to say, to the very department that of set purpose adopted the hostile enactments that cut down and destroyed his rights and remedies.<sup>2</sup>

<sup>1</sup> *Thompson v. Allen County*, 115 U. S. 550 (1885). Mr. Justice *Miller* here reviews the previous cases on the point, and re-affirms the want of any jurisdiction in equity to levy and collect taxes for the satisfaction of judgments against municipalities. The doctrine of want of jurisdiction in equity is maintained, although the remedy at law by *mandamus* has proved ineffectual, and no officers can be found to perform the duty of levying and collecting the taxes. See, further, cases cited in the note to this section; also *post*, chaps. xx. and xxii.

<sup>2</sup> *Heine v. Levee Commissioners*, 19 Wall. 655; *Rees v. Watertown*, 19 Wall. 107; *Barkeley v. Levee Commissioners*, 93 U. S. 258; *Meriwether v. Garrett*, 102 U. S. 472; *Thompson v. Allen County*, 115 U. S. 550; *Amy v. Watertown*, 130 U. S. 301 (1888).

Mr. Hare regards such legislation as a fraud upon the constitutional prohibition against the legislative impairment of contract, and consequently invalid. 1 Am. Const. Law, 640. But the view that such legislation is invalid does not seem to be consistent with the decisions of the Supreme Court on the precise point. The exact limits, however, of legislative power, in respect of depriving the creditors, even by a general repeal of the charter and in connection therewith by prohibitions of the exercise of the taxing power in behalf of

existing creditors, of the remedies in force when their contracts were entered into, or of others legally equivalent thereto, may, we think, be regarded as yet open to further discussion and more definite ascertainment.

On the general subject of the right of creditors of indebted and dissolved municipalities, see: *Ante*, chap. iv. *passim*; particularly, secs. 69, 70, 71; *post*, secs. 171, 186-189; *Cooley, Const. Lim.* 290, 292; *Cooley, Taxation* (2d ed.) 75; *Curran v. Arkansas*, 15 How. (U. S.) 312; *Bacon v. Robertson, supra*; 2 Kent, 307, note; *Broughton v. Pensacola*, 93 U. S. 266 (1876); *Observations of Field, J.*, p. 269; *Milner's Admx. v. Pensacola*, 2 Woods, C.C. 642 (1875); *Laird v. City of De Soto*, 22 Fed. Rep. 421; *Ross v. Wimberly*, 60 Miss. 345; *Brewis v. Duluth*, 13 Fed. Rep. 334; s. c. 9 Fed. Rep. 747; *Garrett v. Memphis*, 5 Fed. Rep. 860; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396, approving text; *County Comm'rs v. Cox*, 6 Ind. 403; *State v. Trustees*, 5 Ind. 77; *Coulter v. Roberson*, 24 Miss. 273; *Gelpcke v. Dubuque*, 1 Wall. 175 (1865); *Von Hoffman v. Quincy*, 4 Wall. 535; *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130; *Thomson v. Lee County*, 3 Wall. 327; *Havemeyer v. Iowa County*, 3 Wall. 294; *Butz v. Muscatine*, 8 Wall. 575; *Lansing v. Treasurer, &c.*, 1 Dillon C. C. 522; *Soutter v. Madison*, 15 Wis. 30;

§ 171 (115). **Changes not amounting to a Dissolution.**—The name of an incorporated place may be changed, its boundaries

Smith v. Appleton, 19 Wis. 468 ; Blake v. Railroad Co., 39 N. H. 435 ; compare Richmond Gaslight Co. v. Middletown, 59 N. Y. 228 (1874) ; *post*, 692 ; Wolff v. New Orleans, 103 U. S. 358 ; Beatty v. The People, 6 Col. 538.

*Memphis City Case* : The city of *Memphis*, in *Tennessee*, having become insolvent and unable to meet its obligations, the legislature of that State in 1879 repealed all laws by which it had been incorporated, and passed a general act establishing what were termed "Taxing Districts" as a "means of local government for the peace, safety, and general welfare" of "communities embraced in the territorial limits of all such municipal corporations" as had, or might have, their charters abolished or might surrender them under the act. In 1881 a similar act established "taxing districts of the second class" for communities having a population of less than 30,000. They were invested with practically all the powers usually conferred upon municipal corporations, except that of levying taxes, which was expressly reserved to the legislature, and that of issuing evidences of indebtedness. It was also expressly provided that the taxing districts, so created, *should not pay*, or be liable for, any debt created by the extinct corporations, and that no taxes collected under the act should ever be used to pay such debts. (For a succinct statement of the principal features of this legislation, see *Meriwether v. Garrett*, 102 U. S. 472, by Mr. Justice *Field*. *Ante*, sec. 169 a.) The organizations formed under these acts are uniformly held to be *municipal corporations*. *State v. Taxing District of Shelby Co.*, 16 Lea (Tenn.), 240 ; *Lea v. State*, 10 Lea (Tenn.), 478 (districts of the second class) ; *Luehrman v. Taxing District*, 2 Lea (Tenn.), 425 ; *O'Connor v. Memphis*, 6 Lea (Tenn.), 730 ; (holding also, that a suit against the old corporation may be revived against the taxing district). They may be sued as any other municipality. *Uhl v. Taxing District*, 6 Lea (Tenn.), 610. As to who may vote on proposition to organize under the act see *Pepper v. Smith*, 15 Lea (Tenn.),

551. The prohibitions against exercising the taxing power held to be void so far as they affect the taxing powers of the former corporations, which became a part of the contracts entered into by them. *Devereaux v. City of Brownsville*, 29 Fed. Rep. 742 (*mandamus* issued to the taxing district to enforce, by taxation, the payment of judgments against the old corporations). Compare with *Meriwether v. Garrett*, *Heine v. Levee Comm'rs*, and other like cases in the Supreme Court of the United States, as to the power to compel the levy of taxes, notwithstanding the repeal of the charter and the prohibition by the legislature to the new officers to levy and collect taxes for the payment of the debts of the dissolved municipality.

*Mobile City Case* : The City of Mobile being largely in debt, the legislature passed an act *repealing the charter of the city and declaring that the corporation was thereby dissolved and abolished*. The act provided for the appointment by the Governor of three commissioners to take possession of the property and assets of the city, except property held for the public use and governmental purposes, and apply the same under the orders of the Court of Chancery to the payment of the debts of the city, giving preference to the floating debt. On the same day the legislature incorporated the Port of Mobile, which included all the thickly settled and closely built portion of the former City of Mobile ; and all of the \$16,000,000 of the taxable property of the city but \$900,000 was included within the limits of the Port of Mobile, and fourteen-fifteenths of the inhabitants of the City were inhabitants of the Port of Mobile. It limited the powers of the Port of Mobile to the levy of a tax of six-tenths of one per cent, and prohibited its authorities from exercising any other powers. Two questions arose, namely : Whether a preceding creditor was entitled to a judgment against the Port of Mobile on the obligations of the City of Mobile ; and second, whether the powers of taxation in existence at the date of the creation of the debt by the City of Mobile could be enforced in favor

enlarged or diminished, and its *mode of government altered*, and yet the corporation *not be dissolved, but in law remain the same*.<sup>1</sup>

of the creditor. Both of these propositions were decided in favor of the creditor. The court stated the general proposition involved as follows:—

“We are of opinion, upon this state of the statutes and facts, that the Port of Mobile is the legal successor of the City of Mobile, and liable for its debts. The two corporations were composed of substantially the same community, included within their limits substantially the same taxable property, and were organized for the same general purposes.

“Where the legislature of a State has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act, or series of acts, repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new.”

The court considered this conclusion to be supported by *Girard v. Philadelphia*, 93 U. S. 266, 270; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *O'Connor v. Memphis*, 6 Lea (Tenn.), 730; and *Amy v. Selma*, 77 Ala. 103.

It held that the remedies in existence for the enforcement of the obligations could not be impaired by subsequent

legislation, or if changed, a substantial equivalent must be provided; that no such equivalent was here provided. The court enforced the contract by which the City of Mobile, in issuing the bonds, agreed to levy a special tax for the payment of the principal and interest, and held that as to the holder of such bonds the obligation to levy such special tax was in force, and rested upon the Port of Mobile, and accordingly directed a peremptory *mandamus* to issue for the satisfaction of the judgment in accordance with the provisions in that behalf in force when the obligation was created. *Mobile v. Watson*, 116 U. S. 289 (1885).

*City of Selma Case*: In *Amy v. Selma*, 77 Ala. 103, it was held that a new corporation named “Selma,” erected to replace one named “City of Selma,” which had been dissolved, was its successor, and liable for its debts—as here in an action upon a judgment recovered against its predecessor. See, also, *Meyer v. Porter*, 65 Cal. 67.

*Town of Kahoka Case*: In *Hill v. Kahoka*, 35 Fed. Rep. 32 (1888), it appeared that the town of Kahoka was duly incorporated under the general statute of Missouri, in 1869, and performed various corporate acts, among others issuing certain railroad aid bonds. In 1886, its charter was forfeited for non-user in a proceeding by *quo warranto*, and thereupon the city of Kahoka, embracing practically the same territory and population, was incorporated under existing laws as a city of the fourth class. Held, in an action upon the coupons, that the city of Kahoka was liable for the bonds. “Municipal corporations cannot extinguish their debts by changing their names or organizing under new charters. A debt once contracted by a municipal corporation will survive as a debt against whatever corpo-

<sup>1</sup> *Ante*, sec. 85, and cases cited; *post*, chap. viii. secs. 176, 177; and see *ante*, chap. iv., where the extent of the legislative authority over municipal corporations is considered. *Girard v. Philadelphia*, 7

Wall. 1 (1868), noted fully, *infra*, sec. 172, note. *Broughton v. Pensacola*, 93 U. S. 266 (1876); and see notes to sec. 170, *supra*, and cases there cited.

§ 172. **Same subject.**—Accordingly, the *substitution of a new municipal charter* in the place of a previous charter, or a change in

rate entity is subsequently created to take its place and exercise its power of local government over substantially the same people and territory," citing *Broughton v. Pensacola*, 93 U. S. 266; *Mobile v. Watson*, 116 U. S. 289; *Laird v. De Soto*, 22 Fed. Rep. 421; *People v. Murray*, 73 N. Y. 535. *Per Thayer, J.*

*City of Brownsville Case*: In *Deveraux v. City of Brownsville*, 29 Fed. Rep. 742, the ruling in *Mobile v. Watson*, *supra*, was followed and extended, it being declared not only that the succeeding corporation was liable for the existing debts of its predecessor, but that all the powers of taxation possessed by such predecessor, which had been conferred as a part of the remedy to which its creditors were entitled, survived to the new corporation, and that their exercise could be compelled by *mandamus*. It was also held that statutes which prohibited the exercise of these powers of taxation were void, as impairing the obligation of contracts.

*Pensacola City Case*: In *Broughton v. Pensacola* (City of), 93 U. S. 266 (1876), an indebted city which had contracted with the creditor to levy a special tax upon real estate within its limits to pay his debt, *surrendered its charter, and the inhabitants residing within the limits of the city organized themselves into a municipal government* under the general incorporation act of the State, in the same way that inhabitants might do who had not been previously incorporated. The creditor filed a bill in equity asking for a decree for the amount of his debt, and that the city be compelled to levy a tax to pay the same. The bill was dismissed by the Circuit Court, and its decree was affirmed by the Supreme Court of the United States. The court held that the new organization, embracing substantially the same corporators and the same territory, although different powers were possessed under the new charter and different officers administered its affairs, was in law to be deemed the successor of the previous corporation and entitled to its rights. Mr. Justice Field, delivering the opinion of the court, said:—

"The ancient doctrine, that, upon the repeal of a private corporation, its debts were extinguished, and its real property reverted to its grantors, and its personal property vested in the State, has been so far modified by modern adjudications, that a court of equity will now lay hold of the property of a dissolved corporation, and administer it for the benefit of its creditors and stockholders. The obligation of contracts, made whilst the corporation was in existence, survives its dissolution; and the contracts may be enforced by a court of equity, so far as to subject for their satisfaction any property possessed by the corporation at the time. In the view of equity, its property constitutes a trust fund pledged to the payment of the debts of creditors and stockholders; and, if a municipal corporation, upon the surrender or extinction in other ways of its charter, is possessed of any property [not of a public nature, see *Meriwether v. Garrett*, *supra*], a court of equity will equally take possession of it for the benefit of the creditors of the corporation. In this case, it is averred in the bill that the city of Pensacola, upon the surrender of its original charter, did not possess any property. It is not necessary, however, in the view we take of the proceedings for the reorganization of the city government, to consider the effect of an absolute repeal of the charter of a municipal corporation upon its obligations. It is sufficient that here, in our judgment, there was a continuation of the corporation of Pensacola, with its original rights of property and obligations, not a new and distinct creation or corporate capacity and liability."

*Case of Mount Pleasant v. Beckwith*: Here an indebted municipal or public corporation was *legislated out of existence, and its territory was annexed to similar corporations*. In the absence of legislative provision otherwise, it was held that the latter corporations became entitled to all the property of the abrogated corporation, and severally liable for a proportionate share of its then subsisting legal debts, and that they were vested with the power to raise revenue with which to pay such

such a charter in whole or in part, where substantially the same territory and the same inhabitants are concerned, will not be presumed, or be held to be the creation of a new corporation, but the

debts by levying taxes upon the property thus annexed and the persons residing thereon; and a bill in equity by the creditors of the extinguished corporation against the corporations thus succeeding to its property and powers was sustained to the extent that the amount of the debt was ascertained, and the sum apportioned among the corporations to which the territory of the indebted corporation had been annexed, and a decree rendered for the amounts thus apportioned to be collected in the manner provided by law. *Mount Pleasant v. Beckwith*, 100 U. S. 514 (1879). There is no intimation in later decisions of the Supreme Court that they are, in any respect, inconsistent with this judgment. See *Meriwether v. Garrett*, 102 U. S. 472; *Barkley v. Levee Commissioners*, 93 U. S. 258; *Broughton v. Pensacola*, 93 U. S. 266; *Thompson v. Allen County*, 115 U. S. 550; *Amy v. Watertown*, 130 U. S. 301 (1888). The actual judgments in all these cases may not be in conflict with each other, but it seems difficult to the author to reconcile all of the reasoning by which the different judgments are supported. See, also, *Beckwith v. Racine*, 7 Biss. 142 (1876), *Drummond and Dyer, JJ.* The point decided may be briefly stated thus: Where a municipality owing railroad aid bonds, which it was provided by statute should be paid by an annual tax upon the property within it, was legislated out of existence, and the territory was included in three other municipalities without any provision being made in respect to the payment of the bonds, it was held that the legislature had the power to make these changes, but that the obligations of the contract and the power of taxation still remained. It was further held that in consequence of these changes the creditor could not sue at law, as service of process on the old corporation could not be made, but that equity would give the creditor a remedy by requiring the existing corporations, within whose boundaries the property included in the old is situate, to levy the necessary taxes to pay the debt in propor-

tion to the amount of territory each obtained. See *Mount Pleasant v. Beckwith*, *supra*; *post*, sec. 186.

In *Nelson v. Newark & Belleville*, 49 N. J. L. 246, where by statute, the *territory of a township had been divided* between a city and another township, with a direction that its debts should be paid proportionately by the city and the township acquiring its territory, it was held that the duty of paying the debts was imposed upon them, and that the creditors could enforce the duty by suit against them directly. See also *Canova v. Commissioners*, 18 Fla. 512; case of *Elizabeth City* N. J. *Post*, chap. xix. sec. 760 *a*.

In the case of the town of Port Gibson *v. Moore*, 13 Sm. & Marsh. (21 Miss.) 157 (1849), it was held, indeed, that the repeal of the charter of an indebted municipal corporation dissolved it; that *such dissolution extinguished debts to and from the corporation*, and that a subsequent act re-incorporating the place did not make it liable for a debt existing anterior to the act repealing its charter. The court overlooked the constitutional provision protecting contracts, and the case as to the effect of a dissolution upon the rights of creditors seems to conflict with those above cited. *Contra*, *Broadway Railway Case*, decided by the Court of Appeals of New York; *People v. O'Brien*, 111 N. Y. 1 (1888), and see cases cited in this note. See further, as to extinguishment of debts by dissolution of corporation, *Malloy v. Mallett*, 6 Jones Eq. 345; *Hopkins v. Whitesides*, 1 Head (Tenn.), 31; *Bank v. Lockwood*, 2 Harring. (Del.) 8; *Robinson v. Lane*, 19 Ga. 337; *Muscatine Turnverein v. Funck*, 18 Iowa, 469; *Owen v. Smith*, 31 Barb. 641; *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130; *Thompson v. Abbott*, 61 Mo. 176 (1875); *post*, chap. xiv.; *Louisville Bridge Co. v. Louisville*, 81 Ky. 189; *St. Louis Bridge Co. v. East St. Louis*, 121 Ill. 238; *State, ex rel. Bridge Co. v. Columbia*, 27 S. C. 137; *post*, sec. 786; *Brooklyn v. Smith*, 104 Ill. 429.

assumption by the old one of new powers and privileges.<sup>1</sup> And where the rights of creditors are involved, the presumption is extremely strong that the identity of the corporation continues, notwithstanding different powers are possessed by the new organization, and different officers administer its affairs.<sup>2</sup>

<sup>1</sup> *State v. Natal*, 39 La. An. 439, where it was said, "The city of New Orleans founded by Bienville about 1718 has never ceased to exist as an agglomeration of human beings for social, commercial, and industrial purposes. . . . In 1805 those inhabitants were given a charter, for the first time since the cession of 1803, and that charter has been altered and amended some way or other, in subsequent years, viz.: 1812, 1818, 1833, 1835, 1837, 1846, 1850, 1852, 1870, and 1882; but the city, the existence of which was generally recognized by the various Constitutions, has retained its identity, not only as a matter of fact, but also as a matter of legal necessity." See *supra*, sec. 170, and cases in note.

Mr. Girard's will of 1831 gave the residuum of his estate by its corporate name to the old city of Philadelphia in trust for certain objects, the primary one being the college, and the secondary ones "to enable the city to improve its police, to improve the city property and the appearance of the city itself, and to diminish taxation." The old city accepted the trust. By 1854 twenty-eight distinct suburban municipalities had grown up around the old city, and by an act of that year all of their charters and that of the old city itself were abolished, and their rights of property transferred to the new consolidated corporation of the city of Philadelphia, which instead of being two miles square has about one hundred and twenty-nine square miles. The heirs of Mr. Girard claimed that the annihilation of the old city and its merger into the immense consolidated corporation defeated the object of the testator. But the court held that "the identity of the corporation was not destroyed, and that the change in its name, the enlargement of its area, &c., did not affect its title to property held at the time of such change, or its capacity to execute the trusts of the will." *Girard v. Philadelphia*, 7 Wall. 1 (1868). The essential point in this case is that it

establishes notwithstanding the change of charter the continuous legal identity of the new city corporation with the old.

<sup>2</sup> *Broughton v. Pensacola*, 93 U. S. 266 (1876); approving *Milner's Admx. v. Pensacola*, 2 Woods, 632; *Walnut Township v. Jordan*, 38 Kan. 562; *ante*, sec. 85, and cases cited, sec. 170, note; *post*, secs. 173, 176, 177.

In delivering the judgment of the court in *Broughton v. Pensacola*, Mr. Justice Field observes:—

"Although a municipal corporation, so far as it is invested with subordinate legislative powers for local purposes, is a mere instrumentality of the State for the convenient administration of government; yet, when authorized to take stock in a railroad company, and issue its obligations in payment of the stock, it is to that extent to be deemed a private corporation, and its obligations are secured by all the guaranties which protect the engagements of private individuals. The inhibition of the Constitution, which preserves against the interference of a State the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where its legislation is susceptible of another construction, that the State has in this way sanctioned an evasion of or escape from liabilities the creation of which it authorized. When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and in the absence of express provision for

§ 173. **Same subject.** — The case contemplated in the preceding sections, in which the *continuous legal existence and identity of a municipality will be held to exist*, where substantially the same inhabitants and the same territory are concerned, notwithstanding a change in boundaries and form of organization has taken place, is one of quite common occurrence and of easy solution. But suppose the legislature absolutely *repeals* the charter or constituent act of an indebted municipality, and makes no provision for the payment of its debts, or, instead of an absolute repeal, it makes such *changes* as do not relate substantially to the same inhabitants and the same territory, as for example supersedes or dissolves the indebted municipality, and annexes what constituted its territory and people to other municipalities, and makes no provision for its debts or their mode of payment. Is the creditor remediless except by an appeal to the legislature? This is a difficult inquiry, and we have endeavored to answer it in the preceding sections and in the cases referred to in the notes, as far as it has been possible to do so in the existing state of the adjudications of the Supreme Court of the United States, whose determination of such questions is final and authoritative.

The author ventures the suggestion that the true solution of the many difficulties may possibly be found in the consideration that the power of a municipality to levy taxes to pay its debts as the power existed at the time when the debts were created, is in its essence not the grant of a power to the incorporated body, but to the inhabitants of the incorporated territory.<sup>1</sup> In this view the power or the contract obligation and duty of its exercise survives the repeal of the charter and the dissolution of the old corporation, and passes, equally with the obligation to pay the debt, to the inhabitants who continue to reside, under any form of organization, within the municipal area in behalf of which the debt was created; the exercise of which power and consequent duty may be compelled by the judicial process of mandamus whenever there are officers in existence who, under the general legislation of the State, have the power to levy and collect taxes.

their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization." See and compare *Barkley v. Levee Comm'rs*, 93 U. S. 258, where a levee district — a quasi public corporation — was superseded in its functions by a law dividing the district, and creating a new corporation for one

portion and placing the other under the charge of the local authorities, and where under the circumstances a judgment creditor was held to be without legal remedy. See also cases of the city of *Memphis*, city of *Mobile*, and city of *Brownsville*, *ante*, sec. 170, note.

<sup>1</sup> *Ante*, secs. 3 a, 170-172, and cases as to the nature of incorporated municipalities.



It is usual, however, for the legislature, on the change or division of municipal and public corporations, to make provision concerning existing indebtedness; and its power to do so, unless restrained by special constitutional provision, is clear and ample.<sup>1</sup>

§ 174 (116). **Revival by new Charter and its Effect.** — It is the doctrine of the English courts that where the *functions of an old corporation are suspended*, or where the corporation, by loss of all its members, or of an integral part, is dissolved as to certain purposes, *it may be revived by a new charter*, and the rights of the old corporation be granted over to the same, or a new set of corporators, who in such case take all the rights and are subject to all the liabilities of the old corporation, of which it is but a continuation.<sup>2</sup>

<sup>1</sup> *Ante*, chap. iv.; *post*, secs. 185, 187, 188, 189; *ante*, sec. 170 and notes, 172, 173. When two municipal corporations (St. Anthony and Old Minneapolis) were merged, by legislative act, into a new corporation, it was held that the new corporation, by force of provisions in the act, was liable for a tort, for which one of the constituent corporations would have been responsible if the merger had not taken place. *Adams v. Minneapolis*, 20 Minn. 484 (1874).

<sup>2</sup> *Rex v. Passmore*, 3 Term R. 119, 247; *Regina v. Bewdley*, 1 P. Wms. 207; *Colchester v. Brooke*, 7 Queen's Bench, 383; *Colchester v. Seaber*, 3 Burr. 1866; *Grant on Corporations*, 304 and note; 2 Kyd, 516. Whether a statute or legislative charter will operate to revive or continue an old, or to create a new and distinct corporation, depends upon the in-

tention of the legislature. *Ante*, chap. v.; *Bellows v. Bank, &c.*, 2 Mason C. C. 43, *per Story*, J.; *Angell & Ames*, sec. 780; *Grant on Corporations*, 304, 305; *Hoffman v. Van Nostrand*, 42 Barb. 174; *Girard v. Philadelphia*, 7 Wall. 1; *Olney v. Harvey*, 50 Ill. 453 (1869); *supra*, secs. 170, 171, 172, 173; *post*, secs. 176, 177; *Neely v. Yorkville*, 10 S. C. 141. Approving text, as to whom the revenue is to be paid on the dissolution of a corporation in New Jersey. See *Heckel v. Sandford*, 40 N. J. L. 180. The late civil war did not suspend the right to the exercise of the franchises of an incorporated town within the lines of the insurrectionary forces, and it might still make valid contracts, notwithstanding it was under the control of the insurgent power. *Selma v. Mullen*, 46 Ala. 411 (1871).

## CHAPTER VIII.

## CORPORATE NAME, BOUNDARIES, AND SEAL.

§ 175 (117). **Name by Grant, by Implication, and by Prescription; Power to change.** — Every corporation must have a *name*. This is essential to distinguish it from other corporations. In England, before the Municipal Corporations Act of 5 and 6 Will. IV. ch. lxxvi., 1835,<sup>1</sup> such corporations obtained their name by having it expressed in their charter (whether royal or parliamentary), or by usage or by implication.<sup>2</sup> If a particular name be given to a corporation in its charter, the corporation can no more change it at its pleasure than a man can at pleasure change his baptismal name. If no name be given to a corporation by its charter or by statute, it may obtain one by implication. Where a corporation exists by prescription, it may have more than one name, but the names, to be recognized as valid, must be prescriptive, and cannot be acquired by usage within the time of memory. It has been decided, in England, that a corporation may have one name by prescription and another by grant; but it is said that the same corporation cannot, at the same time, have two different names by different grants, for the name in the last grant will take the place of the other.<sup>3</sup>

§ 176 (118). **Name under English Municipal Corporations Act.** — But the *English Municipal Corporations Act*, just mentioned, which changed the corporate constitution of the cities, towns, and boroughs of England and Wales, and reduced them to a uniform model, made this provision as to the name of the corporation, under the new act: "Said body, or reputed body, corporate shall take and bear the *name* of the mayor, aldermen, and burgesses of such borough, and by that name shall have perpetual succession, and shall be capable, in law, by the council hereinafter mentioned of such borough, to do and suffer all acts which now lawfully they and

<sup>1</sup> *Ante*, sec. 36, and note.

<sup>2</sup> Glover, 52, 53; Willc. 35; Grant, 50; *ante*, sec. 42. As to *usage*, see *ante*, chap. v. sec. 92.

<sup>3</sup> Knight v. Wells, 1 Ld. Raym. 80; Physicians v. Salmon, 3 Salk. 102; Com. Dig. Franch. F. 9; *per Holt*, 1 Salk. 191;

1 Str. 614; Smith v. Tal. Pl. R. Co., 30 Ala. 650 (1857). See also, All Saints Church v. Lovett, 1 Hall (N. Y.), 191; Manufacturing Co. v. Davis, 14 Johns. 238; Middlesex, &c. v. Davis, 3 Met. 133; Trustees v. Peaslee, 15 N. H. 317; Society, &c. v. Young, 2 N. H. 310.

their successors may do and suffer, by any name or title of incorporation, so far as not altered or annulled by the provisions of this act.”<sup>1</sup> It is settled by the decisions under this act that the true or proper corporate name for *boroughs* mentioned in it is “mayor, aldermen, and burgesses of the borough of —,” and (under the interpretation clause, sec. 142 of the act) for cities, “mayor, aldermen, and citizens of the city of —.”<sup>2</sup> It may also be here observed that the courts have determined that, though this act changed the name and made new and important alterations in the constitution of the corporations, yet that its *effect was not* in any case to *create a new corporation, but to continue the old*, with all its rights, privileges, and franchises, except so far as inconsistent with the provisions of the act.<sup>3</sup> But the name mentioned in the act would doubtless govern, and by that they would have to sue and be sued.

§ 177 (119). **Name under Charter or Legislative Act in this country.** — *Municipal Charters granted by legislative enactment in this country* almost invariably *prescribe the name* of the corporate body thus: “The inhabitants of the city or town of — are hereby constituted a body politic and corporate, by the name and style of ‘city of —’ or ‘town of —.’”<sup>4</sup> So the general municipal incorporation acts usually contain a provision to the effect that “cities and towns organized or to be organized thereunder are declared to be bodies politic and corporate, under the name and style of the city of —, or town of —, as the case may be,” &c.

<sup>1</sup> 5 and 6 Will. IV. chap. lxxvi., sec. 6; *ante*, sec. 35, and note. By the Consolidated Municipal Corporations Act of 1882, sec. 8, it is provided that “the Municipal Corporation of a borough shall bear the *name* of the mayor, aldermen, and burgesses of the borough, or in the case of a city, the mayor, aldermen, and citizens of the city.”

<sup>2</sup> *Attorney-General v. Corporation of Worcester*, 2 Phillips, 3; *Corporation of Rochester v. Lee*, 15 Sim. 376; *Grant*, 342; *Rawlinson*, 13.

<sup>3</sup> *Corporation of Ludlow v. Tyler*, 7 Car. & P. 537; *Attorney-General v. Wilson*, 9 Sim. 30, 48; *Attorney-General v. Kerr*, 2 Beav. 420, 429; *Attorney-General v. Corporation of Leicester*, 9 Beav. 546; *Doe, &c. v. Norton*, 11 M. & W. 913, 928. *Parke*, B., there said, “Though the name and style of the corporation, and the mode

of electing members were changed, the *identity of the body itself* was not affected.” *Ante*, chap. vii. secs. 171, 176.

<sup>4</sup> *Ante*, sec. 39. *Harrison, Munic. Manual*, 4th ed. 11.

The proper corporate name of a municipal corporation ought always to be used. But it has been decided in Canada that a by-law of a municipal council is valid if it appear on the face of it to have been enacted by a municipal body having authority to make the by-law under the municipal laws. *Flewellyn v. Webster*, 6 U.C. Q. B. 586; *Hawkins v. Huron*, *Perth and Bruce, in re*, 2 Upper Can. C. P. 72; *Fisher v. Vaughan*, 10 Upper Can. Q. B. 492; *Barclay and Darlington, in re*, 11 Upper Can. Q. B. 470; *Brophy and Gananoque*, 26 Upper Can. C. P. 290; see also *Gwynne v. Rees*, 2 Upper Can. P. R. 282.

Where such an act authorized any existing town or city to adopt its provisions in place of its special charter, and was silent as to the corporate name after the change was made, it was held that the former name was retained.<sup>1</sup>

§ 178 (120). **Change of Name; Name by Reputation.** — Where a name is given to a municipal corporation by charter or statute, this cannot be changed by the act of the corporation.<sup>2</sup> But in this country, general statutes are not unfrequent, authorizing the creation of *quasi* corporations, without making it necessary to designate the name by which a particular district shall be called; in such case it may acquire a name by reputation, and sue and be sued by such name.<sup>3</sup>

§ 179 (121). **Misnomer and Effect thereof.** — A misnomer, or variation from the precise name of the corporation, in a grant or obligation by or to it, is not material, if the identity of the corporation is unmistakable, either from the face of the instrument or from the averments and proof.<sup>4</sup>

<sup>1</sup> Johnson v. Indianapolis, 16 Ind. 227 (1861). Corporate name of the city organized under a general act not judicially noticed. *Ib.* Limits of Indianapolis are fixed by public law, and public records open to all. Newman v. Sylvester, 42 Ind. 106 (1873); *ante*, secs. 41, 83.

<sup>2</sup> Willcock, 34, 37, 38; Regina v. Registrar Joint Stock Cos., 10 Q. B. 839. See Episcopal Society v. Episcopal Church, 1 Pick. 372. Change of name does not necessarily involve a change of identity. Girard v. Philadelphia, 7 Wall. 1; *ante*, chap. vii. sec. 174.

<sup>3</sup> School District v. Blakeslee, 13 Conn. 227 (1839); The Queen v. The Registrar of Joint Stock Cos., 10 Q. B. 839; Episcopal Charitable Society v. Episcopal Church, 1 Pick. 372; see further, The King v. Norris, 1 Ld. Raym. 337; The Queen v. Bailiffs of Ipswich, 2 Ld. Raym. 1232, 1238, 1239. As to *quasi* corporations, *ante*, sec. 22, and note; *post*, chapter on Actions.

<sup>4</sup> Inhabitants v. String, 5 Halst. (N. J.) 323 (1829); Neely v. Yorkville, 10 S. C. 141, approving text; Kentucky Seminary v. Wallace, 15 B. Mon. 35 (1854); New York Conference v. Clarkson, 4

Halst. Ch. (N. J.) 541 (1851); Angell & Ames, sec. 185; Pendleton v. Bank of Kentucky, 1 Mon. 177; Medway Cotton Manufacturing Co. v. Adams, 10 Mass. 360; People v. Love, 19 Cal. 676; African Society v. Varick, 13 Johns. 38; Woolrich v. Forrest, 1 Pa. 115; Bower v. State Bank, 5 Ark. 234; Pierce v. Somersworth, 10 N. H. 369; Pittsburgh v. Craft, 1 Pitts. (Pa.) 158 (1871); Douglas v. Branch Bank, &c., 19 Ala. 659. *Slight variances* in the use of corporate names, where substantially correct, have been held immaterial even in matters of contract. Brock District v. Bowen, 7 Upper Can. Q. B. 471; The Trent and Frankford Road Co. v. Marshall, 10 Upper Can. C. P. 336; Whitby v. Harrison, 18 Upper Can. Q. B. 603; Bruce v. Cromar, 22 Upper Can. Q. B. 321. See also Mayor and Burgesses of Lynne Regis, 10 Coke Rep. 120, 122; Mayor of Carlisle v. Blamire *et al.*, 8 East, 487; The King v. Croke, Cowp. 29; Beverley v. Barlow, 10 Upper Can. C. P. 178; Goodwin and The Ottawa and Prescott Railway Co., *In re*, 13 Upper Can. C. P. 254. It was, however, held differently as to the entitling of a rule in a proceeding against a municipal corpora-

§ 180 (122). **Same subject.**—Where the *intention of the testator* is clear, a *mistake in the name or description* of the object of his bounty will not make the devise void. This general principle is applicable to all corporations, private and public. But the intention must be so clear as to remove all reasonable doubt as to the corporation meant. This rule may be illustrated by a few examples. Thus, a devise to a college by its common name, though not the true corporate name, is good.<sup>1</sup> So where the devisees were called by their popular name, "*The South Parish in Sutton*," their legal name being "*The First Parish in Sutton*," the devise was sustained.<sup>2</sup> So, also, the "*Mayor, Jurats, and Commonalty of the Town of Rye*," that being the corporate name, were held entitled to lands by a devise to "*The Right Worshipful the Mayor, Jurats, and Town Council of the Town of Rye*," although there was no town council in the town, and although the court admitted the proposition of counsel against the will, that if the "intent appears to give to a *part* of the corporation, although that intent fails of effect, the *whole* corporation cannot take."<sup>3</sup> So, also, a devise to the Mayor, Chamberlain, and Governors, is valid to a corporation whose true name is Mayor, Citizens, and Commonalty.<sup>4</sup> So, a legacy may be given

tion. *Sams v. Toronto*, 9 Upper Can. Q. B. 181; *Harrison, Munic. Manual*, 4th ed. 11.

"The general rule to be collected from the cases is," says Chancellor *Kent*, "that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument, or is shown by proper averments, will not invalidate a grant by or to a corporation, or a contract with it, and the modern cases show an increased liberality on this subject." 2 *Kent Com.* 292; approved, *St. Louis Hospital v. Williams, Administrator*, 19 Mo. 609 (1854). "We adopt the more reasonable rule laid down by Mr. *Kyd* (Corp. Vol. I. pp. 286, 288), that the variance must be materially different in substance, to injure." *Per Curiam*, *People v. Runkle*, 9 Johns. 147, 157.

"I take the law of the present day to be, that a departure from the strict style of the corporation will not avoid its contracts, if it substantially appear that the particular corporation was intended, and that a latent ambiguity may, under proper averments, be explained by parol evidence in this as in other cases, to show the intention." *Per Gibson, J.*, in *President*,

&c. *v. Myers*, 6 Serg. & Rawle, 12; s. p. *Milford, &c. Co. v. Brush*, 10 Ohio, 111.

When an act of parliament makes a grant to a corporation, it takes effect though the true corporate name be not used, provided the corporation intended be sufficiently identified or described. 1 *Kyd*, 256; *Chancellor of Oxford's Case*, 10 Co. 44, 57b.

<sup>1</sup> *Chancellor of Oxford's Case*, 10 Co. 87b.

<sup>2</sup> *First Parish in Sutton v. Cole*, 3 Pick. 232 (1825), and cases there cited.

<sup>3</sup> *Attorney-General v. Mayor of Rye*, 7 Taunton, 546; 2 Eng. Com. Law, 213 (1817).

<sup>4</sup> *Owen*, 35 (14 Eliz.). "The devise held good by *Dyer*, *Weston*, and *Manwood*, for it shall be taken according to the intent of the devisor." See also *Counden v. Clerke, Hobart*, 32; *Croydon Hospital v. Farley*, 6 Taunton, 467; 1 Eng. Com. Law, 457 (1816), where *Gibbs, C. J.*, justly condemns the absurd nicety of many of the decisions from the reign of Edward VI. to the end of James I., on the subject of the names and description of corporate bodies.

or a devise made to a corporation either by its corporate name or by a description which clearly distinguishes and identifies the legatee.<sup>1</sup>

§ 181 (123). **Corporate Name in Suits.** — Where the name of the corporation is expressly defined by charter or statute, it is usually provided in terms that by *such* name it may *sue and be sued*. In such case the true corporate name should be used both in suits by and against the corporation. A name in a grant or obligation to or by a corporation may be sufficient to enable the corporation to enjoy or to make it liable, which would not be sufficient in an action by or against it.<sup>2</sup> If the name of a corporation is *lawfully changed*, not the identity of the corporation itself, suit should, in general, unless provision be otherwise made, be in the new name.<sup>3</sup> If a note, bond, or other promise be made to a corporation by a name differing from the corporate name, the corporation may sue in its true name, and allege that it is the party to whom the promise or obligation was made.<sup>4</sup>

§ 182 (124). **Corporate Boundaries must be definite.** — Since the leading object of an American municipal corporation is to invest

<sup>1</sup> New York Institute v. How, 10 N. Y. (6 Seld.) 84 (1854). In this case the plaintiff, whose corporate name was "The New York Institution for the Blind," was decided to be entitled to a legacy given to the "Trustees of the Institution for the Maintenance and Instruction of the Indigent Blind," there being no other institution in the city of New York for the blind. See also Vansant v. Roberts, 3 Md. 119; Preachers' Aid Society, 45 Me. 552; Chapin v. School District, &c., 35 N. H. 445; Minot v. Boston Asylum, 7 Met. 416. *Parol evidence* may, in proper cases, be received to identify the corporation intended. Trustees v. Peaslee, 15 N. H. 317; Bodman v. American Tract Society, 9 Allen, 447.

<sup>2</sup> Cambridge University v. Crofts, 10 Mod. 208; 1 Kyd, 253; Willc. 37; Brittan v. Newland, 2 Dev. & Bat. (N. C.) 363; Insane Asylum v. Higgins, 15 Ill. 185; Berks Co., &c. v. Myers, 6 Serg. & Rawle (Pa.), 12; Clarke v. Potter Co., 1 Barr (Pa.), 163; Porter v. Blakely, 1 Root (Conn.), 440; Kentucky Seminary v. Wallace, 15 B. Mon. 35; Romeo v. Chapman, 2 Mich. 179; County Court v. Griswold, 58 Mo. 175 (1874); Carder v.

Comm'rs, 16 Ohio St. 353; Trustees v. Campbell, 16 Ohio St. 11.

<sup>3</sup> Colchester v. Seaber, 3 Burr. 1866; Regina v. Ipswich, 2 Ld. Raym. 1232, 1238; Angell & Ames, sec. 644; Glover, 63. Mr. Kyd says: "Where a corporation becomes liable to any duty, and then its name is changed, the *writ* brought against it should be in the new name." 1 Corp. 288. On a merger, by statute, of a *town* into a *city* corporation, it was provided that all of the books, papers, moneys, and effects of the former should vest in the latter. *Held*, that a suit on a bond made to a town before the transfer could not afterwards be instituted in the name of the town, but should be brought in the corporate name of the city. Fort Wayne v. Jackson, 7 Blackf. (Ind.) 36 (1843).

<sup>4</sup> 10 Co. 125 5; 1 Kyd, 287; African Society v. Varick, 13 Johns. 38 (1816); Trustees v. Reneau, 2 Swan (Tenn.), 94 (1852); Fort Wayne v. Jackson, 7 Blackf. (Ind.) 36 (1843). An allegation that the defendants acknowledged themselves to be bound unto the *plaintiffs, by the description, &c.*, is equivalent to such an averment. 13 Johns. 38, *supra*.

the inhabitants of a defined locality or place with a corporate existence, chiefly for the purposes of local government, it is obvious that the *geographical limits* or boundaries of the corporation *ought to be defined and certain*. These boundaries are usually described in the charter or constituent act, or a method is prescribed therein, by which they may be ascertained and settled. Because residence within the corporation confers rights and imposes duties upon the residents, and the local jurisdiction of the incorporated place is, in most cases, confined to the limits of the corporation, it is necessary that these limits be definitely fixed.<sup>1</sup> They are established by legis-

<sup>1</sup> *Cutting v. Stone*, 7 Vt. 471; *Gray v. Sheldon*, 8 Vt. 402; *Pierce v. Carpenter*, 10 Vt. 480. The general rule is that municipal corporations cannot exercise their powers beyond their own limits, but there are some exceptions, as for example to provide for the discharge of sewage. *Coldwater v. Tucker*, 36 Mich. 474 (1877); s. c. 24 Am. Rep. 601; *Gilchrist's Appeal*, 109 Pa. St. 600. Whether particular property is within the boundaries of a city is a question of fact. *Indianapolis v. McAvoy*, 86 Ind. 587.

As to boundaries generally, and construction of acts relating thereto, see *Hamilton v. McNeil*, 13 Gratt. (Va.) 389; *Raab v. Maryland*, 7 Md. 483; *Green v. Cheek*, 5 Ind. 105; *People v. Carpenter*, 24 N. Y. 86; *Elmendorf v. Mayor, &c.*, 25 Wend. 693; *post*, secs. 562, 634. A municipal corporation cannot usually exercise its powers beyond its own limits. Considerations of public policy sometimes induce the legislature to grant authority to do so, as where a water supply must be obtained from a distance. *Coldwater v. Tucker*, 36 Mich. 474 (1877).

*Places bounded on rivers*: The following cases relate to questions which have arisen with respect to places bounded on rivers. An act extending the bounds of a town over the adjacent navigable waters does not thereby grant to the town the land covered by the water, and consequently confers no right to make rules to regulate the use of such land, although such an act will bring the territory within the limits of the town for the purpose of civil and criminal jurisdiction. *Palmer v. Hicks*, 6 Johns. 133 (1810).

In *New Hampshire*, towns bounded by or on rivers not navigable, or by lines up

and down the river, extend to the centre of the river, and this principle is held to apply to the great streams, the Connecticut and the Merrimack. *State v. Canterbury*, 8 Fost. (28 N. H.) 195 (1854); *State v. Gilmanton*, 14 N. H. 467. See, also, *Cold Springs, &c. v. Tolland*, 9 Cush. 492.

In *Connecticut*, towns bounded on rivers in some instances take the land on each side of the river, in which case the whole river is within the jurisdiction of the town. In other instances, where towns are bounded on rivers, the jurisdiction thereof is construed, without any express provision to that effect, and in virtue of ancient usage to that effect, to extend to the centre of the stream. Opposite towns have each political and civil jurisdiction to the centre, though the charter limits extend only to the stream or margin or channel thereof. *Pratt v. State* (assault on officer on the river Connecticut), 5 Conn. 388 (1824); *Hayden v. Noyes* (oyster fishery on the Connecticut River), 5 Conn. 391, 395. *Hosmer, C. J.* (5 Conn. 395), remarks: "Every part of the Connecticut River, so far as it relates to jurisdiction, is within some town in the State; or these waters would be a sanctuary for debtors or criminals. Such has been the invariable usage."

The jurisdiction of *Brooklyn*, for police purposes, extends to low-water line whether formed naturally or artificially. *Furman Street*, 17 Wend. 649, 661. See *Udall v. Trustees*, 19 Johns. 175; *Stryker v. Mayor*, 19 Johns. 179; as to boundary of *New York City*. By statute, the bounds of *Albany* extend to the middle of the Hudson River. 9 Wend. 602. Eastern boundary line of *St. Louis* was defined by the

lative authority. The power to incorporate a place necessarily includes the power to fix its boundaries.<sup>1</sup>

§ 183. **Legislative Power to fix and determine Geographical Limits; Delegation of such Power.** — *The fundamental idea of a municipal corporation proper, both in England and in this country, is to invest compact or dense populations with the power of local self-government. Indeed, the necessity for such corporations springs from the existence of centres or agglomerations of population, having, by reason of density and numbers, local or peculiar interests and wants, not common to adjoining sparsely settled or agricultural regions. It is necessary to draw the line which defines the limits of the place and people to be incorporated. This is with us a legislative function.<sup>2</sup> And, therefore, in a special charter incorporating a place, the boundaries are expressly defined in the charter itself, and the power of the legislation by its direct action thus to determine the extent of the geographical limits of the corporation is very broad, and in fact unlimited, except where the provisions of the charter are such as would contravene constitutional limitations, express or implied. But where municipalities are organized under general statutes no*

charter to be the Mississippi River, and it was held to extend to the middle of the stream, and not simply to the bank. *Jones v. Souldard*, 24 How. 41 (1860).

In *Pennsylvania* if a municipal corporation is bounded by a navigable river its low-water mark is the limit. *Gilchrist's Appeal*, 109 Pa. St. 600.

Where the riparian proprietor only owns to high-water mark, and all below belongs to the State, a city cannot tax lots covered by water beyond high-water mark. *State v. Jersey City*, 1 Dutch. (N. J.) 525; 1 Dutch. 530.

Statute duty as to *bridges* of adjacent towns bounding on a river running between them. *Brookline v. Westminster*, 4 Vt. 224; *Granby v. Thurston*, 23 Conn. 416. The same construction that is given to grants is given to statutes which prescribe the boundary of incorporated territories. Thus, where a stream not navigable is made the boundary, the centre of the stream is the true line. *Cold Springs, &c. v. Tolland*, 9 Cush. 492 (1852) (action for defective bridge); *Inhabitants of Ipswich*, 13 Pick. 431; *Granger v. Avery*, 64 Me. 292 (1874).

<sup>1</sup> *Galesburg v. Hawkinson*, 75 Ill. 156; *Kelly v. Pittsburgh*, 104 U. S. 78. The power to change the territorial limits of a municipal corporation cannot, in Tennessee, be delegated to a court. *Willett v. Bellville*, 11 Lea (Tenn.), 1. "It is certainly not within the power of the legislature to give to a municipal corporation the power of absorbing as much of the property, and as many of the people, of a county, as it may suit the wishes of the municipal authorities to make subjects of their taxation and ordinances." *Irving, J., County Commissioners v. Bladensburg*, 51 Md. 465. The legislature may, in *Arkansas*, vest in a court the power to determine when the limits of a town may be extended. *Foreman v. Town of Marianna*, 43 Ark. 324. A petition praying for a *certiorari* to bring up the record of such a court, must show that the petitioners are interested in the question *as residents or property owners*, either in the old town or in the district sought to be annexed. *Perkins v. Holman*, 43 Ark. 219.

<sup>2</sup> *Ante*, secs. 9, 19, 22, 28, 29, 32, 37, 41, 44, 54, 58, 72, 73.



expression of the legislative will as to the exact boundaries of any particular place proposing to become incorporated can be made. The vital question of boundaries must then be determined in some other mode. The legislation of the different States in which this system of organizing municipal corporations has been adopted, is not uniform in its details; but the authority to incorporate has usually been restricted as in England to cases in which communities more or less dense and populous already exist, and who desire to take on a corporate character in order to exercise the powers of local government.<sup>1</sup> When duly organized their powers are prescribed and defined by the general incorporating statutes. But how and by whom is the extent of territory to be included within the corporate limits (which necessarily settles what property and what persons will become subject to municipal rule) to be determined? Unless specially restrained by the State Constitution, the legislature may delegate this power to appropriate local bodies or boards or officers;<sup>2</sup> but it has in several cases been made a question how far this power, which is essentially political or administrative, may be conferred upon the judicial courts. This depends somewhat upon local constitutions, laws, and usages; and the principal cases on the subject are referred to in the note.<sup>3</sup>

<sup>1</sup> *People v. Bennett*, 29 Mich. 451 (1874); s. c. 18 Am. Rep. 107, where this subject is, with his usual ability, learnedly examined by *Campbell, J.*, from whose opinion the doctrines of the text have mainly been deduced.

<sup>2</sup> *People v. Bennett, supra*; *Blanchard v. Bissell*, 11 Ohio St. 96 (1860); *People v. Carpenter*, 24 N. Y. 86 (1861); *Devore's Appeal*, 56 Pa. St. 163; *Borough of Blooming Valley*; *Id.* 66; *Osgood v. Clark*, 6 Fost. (26 N. H.) 307. "Acts of the legislature conferring upon municipal corporations the power to extend their limits have been generally upheld;" *per Henry, C. J.* *Kelly v. Meeks*, 87 Mo. 396, citing *Stilz v. Indianapolis*, 55 Ind. 515; *Taylor v. Fort Wayne*, 47 Ind. 274; *People v. Bennett*, 29 Mich. 451; *Blanchard v. Bissell*, 11 Ohio St. 96; *People v. Carpenter*, 24 N. Y. 86; *Devore's Appeal*, 56 Pa. St. 163, and the text.

In *The People v. Bennett, supra*, arising under the Michigan Statute of 1873, for the general incorporation of villages within any two square miles of territory, an attempt was made to incorporate as one

two village settlements separated by intervening farms. It was held that the statute was unconstitutional, because it allowed the petitioners for incorporation to decide upon extent of territory to be incorporated, and because the legislature had attempted to delegate legislative powers in this respect to private citizens, instead of legal bodies, boards, or officers, no notice, no hearing, and no right to a hearing being provided.

<sup>3</sup> *People v. Bennett, supra*, and cases cited in last note. But compare with *People v. Nevada*, 6 Cal. 143, in which it was held that the judicial courts could not be empowered to act in the incorporation of towns, because it was not a judicial act. *Contra, Kayser v. Trustees, &c.*, 16 Mo. 88; *ante*, sec. 41, note; sec. 182, note and cases. In *Illinois* it has been decided that the legislature cannot constitutionally confer upon the judicial courts the power to change the boundaries of municipalities by annexing or disannexing territory, as such acts are legislative and not judicial. *Galesburg v. Hawkinson*, 75 Ill. 152. See, however, *Blanchard v. Bissell*,

§ 184 (125). **Only one Corporation of Same Kind in Same Area.** —

There cannot be, at the same time, *within the same territory*, two distinct municipal corporations, exercising the same powers, jurisdictions, and privileges.<sup>1</sup>

11 Ohio St. 96 (1860) ; *post*, sec. 185, note. In *Arkansas* the determination of what the boundaries are is within the power of the courts. *Little Rock v. Parish*, 36 Ark. 166.

<sup>1</sup> Willc. on Corp. 27 ; *Patterson v. Society, &c.*, 4 Zab. (24 N. J. L.) 385, 399, *per Green*, Q. J. (1854) ; *Rex v. Passmore*, 3 Term R. 243 ; *Rex v. Amery*, 2 Bro. P. C. 336 ; *Grant on Corp.* 18. "This," says *Osborn, J.*, "is a self-evident proposition." *Taylor v. Fort Wayne*, 47 Ind. 281 (1874) ; *Strosser v. Fort Wayne*, 100 Ind. 443 ; *Drain Commissioner v. Baxter*, 57 Mich. 127.

The city of Chicago adopted an ordinance prohibiting any person, company, or corporation within the city, or *within a mile of the city limits, from engaging in the business of slaughtering animals for food, or packing them for market, or rendering the offal, bones, &c., of any dead animal matter, &c., . . . until they shall have obtained a license therefor.* The defendant was a corporation, organized under the laws of the State, and when the suit was instituted against the company it was carrying on the kind of business mentioned in the ordinance. Its factory was in Cook County, *outside of the city limits, and within the town of Lake*, in that county, and it had then a license from the town of Lake to carry on the kind of business it was engaged in, but had no license from the city of Chicago. It was urged that the city of Chicago had no power to pass or enforce the ordinance. *Walker, J.*, who delivered the opinion, after a careful discussion of the questions, viz. : 1. Whether the General Assembly had granted the power to the city of Chicago to pass an ordinance of such a character ; 2. Whether the power was also granted to exercise police restraint outside of the city limits, and within another municipality, says : "We must conclude that the General Assembly, rather than subject one large city to such hazards from smaller municipalities in

their immediate vicinity, would have repealed the charter of the latter, or at least curtailed their power. What in the open and thinly settled country would not be obnoxious as a nuisance, would in the heart of a city be a terrible nuisance. Persons then desiring to engage in particular avocations in or near to cities, must submit to have their pursuits limited and contracted. Whilst trade, manufactures, and commerce have large claims on the laws for protection, theirs is not the only, nor have they the highest claims. . . . To accomplish this purpose (protect health and lives), the power was conferred by the legislature upon cities and villages to regulate these establishments for the distance of one mile beyond their corporate limits, even if that should lap over and embrace a portion of territory embraced in the boundaries of another municipality." *Chicago Packing Co. v. Chicago*, 88 Ill. 221 (1879). Where the boundary line of a corporation was vague and indefinite, the *practical interpretation* which had been given to the statute by the citizens of the disputed district in exercising municipal privileges, such as voting, &c., was adopted by the court. *Milne v. Mayor, &c.*, 13 La. 69 (1838). See, also, *Hamilton v. McNeil*, 13 Gratt. (Va.) 389 (1856) ; *post*, sec. 420 note. Where the *middle of a road is the dividing line* between two towns, each is bound for defects within its own limits. They cannot be jointly indicted for a defect within the jurisdiction of one. In this case the defect was in a bridge forming part of the road. *State v. Thomaston and Rockland*, 74 Me. 198. Boundaries may be *defined by long use*, confirmed by a legislative recognition. *People v. Farnham*, 35 Ill. 562. If a *dwelling-house is divided by the boundary line* between two towns, that portion of the house which the occupant mainly and substantially makes his home (as by sleeping, eating, &c.) fixes his residence, and he cannot elect to reside and be taxed in the other town. *Chenery v. Waltham*, 8 Cush. 327.

§ 185 (126). **Enlargement of Boundaries.**—Not only may the legislature originally fix the limits of the corporation, but *it may, unless specially restrained in the Constitution, subsequently annex, or authorize the annexation of, contiguous or other territory, and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or on the annexed territory.* And it is no constitutional objection to the exercise of *this power of compulsory annexation* that the property thus brought within the corporate limits will be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the legislature to determine.<sup>1</sup>

In *Indiana* the qualified voters of a city within the limits of a township are held to be voters of the township for the purpose of a township tax in aid of a railroad, and their property taxable within the township for that purpose. *Scott v. Hausheer*, 94 Ind. 1.

<sup>1</sup> *Blanchard v. Bissell*, 11 Ohio St. 96 (1860), defining *contiguity* and construing statute authorizing county commissioners to annex; following and approving *Powers v. Wood County*, 8 Ohio St. 285 (1858). *Ante*, sec. 63 and cases. See also *Laramie County v. Albany County*, 92 U. S. 307 (1875); *Queen v. Local Governing Board*, L. R. 8 Q. B. 227; *Woods v. Henry*, 55 Mo. 560; *Giboney v. Girardeau*, 58 Mo. 141; *State v. McReynolds*, 61 Mo. 203 (1875); *Layton v. New Orleans*, 12 La. An. 515 (1857); *Arnoult v. New Orleans*, 11 La. An. 54; *Cheany v. Hooser*, 9 B. Mon. 330; *Gorham v. Springfield*, 21 Me. 59; *Morford v. Unger*, 8 Iowa, 82 (1859); *St. Louis v. Russell*, 9 Mo. 507 (1845); *St. Louis v. Allen*, 13 Mo. 400 (1850); *Smith v. McCarthy*, 56 Pa. St. 359; *Chandler v. Boston*, 112 Mass. 200 (1873); *Railroad Co. v. Spearman*, 12 Iowa, 112; *Wade v. Richmond*, 18 Gratt. (Va.) 583 (1868); *Norris v. Mayor, &c.*, 1 Swan (Tenn.), 164; *Elston v. Crawfordsville*, 20 Ind. 272; *Edmunds v. Gookins*, *Ib.* 477; *Girard v. Philadelphia*, 7 Wall. 1 (1868); *Covington v. East St. Louis*, 78 Ill. 548; *Graham v. Greenville*, 67 Tex. 62 (citing text); *Board, &c. of Chickasaw Co. v. Board, &c. of Sumner Co.*, 58 Miss. 619; *Washburn v. Oshkosh*, 60 Wis. 453. "It would re-

quire," says *Swan, J.*, in *Powers v. Wood County*, 8 Ohio St. 285, 290, "a very artificial and unsound mode of reasoning to hold that territory could not be annexed to a town which owed debts, until the owners of such territory were paid a compensation in money for a proportional part of such debts, on the ground that the property annexed was condemned for public use. It is not to be presumed that a municipal corporation has contracted a debt without being correspondingly benefited." The doctrine of the text approved. *United States v. Memphis*, 97 U. S. 284 (1877); noted, *ante*, sec. 63. In *Michigan* there are constitutional limitations on the right of the legislature to change, except as provided in the Constitution, municipal boundaries so far as to interfere with *representative districts*. *Attorney-General v. Bradley*, 36 Mich. 447 (1877); *Attorney-General v. Holihan*, 29 Mich. 116.

The tenacity with which the people of New England cling to the popular or *town* form of government has been before noticed (*ante*, secs. 28, 29); and the Constitution of *Massachusetts* in the second amendment, accepted in 1821, contains the provision that the legislature "shall have full power and authority to *erect and constitute* municipal or city governments, in any corporate town or towns in this commonwealth, . . . *provided*, that no such government shall be erected or constituted in any town not containing 12,000 inhabitants, nor unless it be with the consent and on the application of a majority of the inhabitants of such town present

**§ 186. Property and debts on Legislative Extinction.** — Where no constitutional restriction exists, the corporate existence and powers of

and voting thereon at a meeting duly warned and holden for that purpose." The legislature, without any application by a majority of the inhabitants of the town of Brookline, which contained a population of about 6,500, annexed it to the city of Boston, the act to take effect if accepted by a majority of voters voting at meetings to be held for that purpose. In the case of *Chandler v. Boston*, 112 Mass. 200 (1873), the question was presented whether an entire town with less than 12,000 inhabitants can be annexed to a city, and also whether a *previous application* of a majority of the inhabitants of the town is not essential to the *erection or constitution* of a city government therein or over the inhabitants thereof. The validity of the act providing for such annexation was sustained. See opinion of Justices, 6 Cush. 580; *Warren v. Charlestown*, 2 Gray, 104, as to general power of the legislature to change the boundaries of towns and cities. *Owners of property in a territory proposed to be annexed* have such an interest in the matter of annexation as will entitle them to resort to the courts to question the validity of an election to determine it. *Morris v. Nashville*, 6 Lea (Tenn.), 337.

It is held in *Pennsylvania* that under the terms of the act of the legislature authorizing the incorporation of villages, the boundaries cannot be extended so as to include a *large body of farm lands*; but the district to be incorporated should be restricted by the courts in which the proceeding is had, so as to include no more than the village itself and its proper territory. *Borough of Little Meadows*, 35 Pa. St. 335 (1860); *Devore's Appeal*, 56 Pa. St. 163; *Blooming Valley*, 56 Pa. St. 66. These cases commented on by *Campbell, J.* *People v. Bennett*, 29 Mich. 451 (1874); s. c. 18 Am. Rep. 107. As to *taxation*, for general municipal purposes, of *rural property within corporate limits*, and the restrictions on the right, see chapter on *Taxation*, *post*, secs. 794, 795.

In *Indiana*, under act of June 18, 1852, *lots adjoining a city*, which are laid off, platted, and recorded, may be included

within the city limits by resolution of the common council. Contiguous territory not thus laid off, &c., can only be annexed by petition to the board of *county* commissioners. *Jeffersonville v. Weems*, 5 Ind. (Porter) 547 (1854). Annexed tracts, under this act, *need not all be contiguous to the city*; if they are contiguous to each other and one is contiguous to the city, it is sufficient. *Huff v. Lafayette*, 108 Ind. 14. One or more citizens of the territory sought to be annexed may maintain injunction to prevent an illegal annexation (*Delphi v. Startzman*, 104 Ind. 343), but he is *estopped* from objecting if he delays taking action when he knows the city is spending large sums of money upon the annexed district, even though its proceedings are void by reason of mistake of fact by its officers. *Strosser v. Fort Wayne*, 100 Ind. 443. See also as to *laches*, *Logansport v. La Rose*, 99 Ind. 117. Where there is *jurisdiction* in the annexation proceedings, irregularities and errors will not render them void so that they may be attacked in collateral proceedings. *Terre Haute v. Beach*, 96 Ind. 143; s. p. *Cicero v. Williamson*, 91 Ind. 541. An individual cannot question the right of the corporation to exercise the functions, powers, and authority of an incorporated city. This can only be done by *quo warranto* in behalf of the State. *Mullikin v. Bloomington*, 72 Ind. 161, (application for injunction to restrain collection of taxes on the ground that the corporate existence was unlawfully changed from that of a town to that of a city, refused). Construction of existing laws on subject of annexation of *Platte Territory*. *Taylor v. Fort Wayne*, 47 Ind. 274 (1874).

Effect of extension of corporate limits on *homestead right*, where different provisions are made for country and town homesteads. *Taylor v. Boulware*, 17 Tex. 74; *Finley v. Dietrick*, 12 Iowa, 516; *Truax v. Pool*, 46 Iowa, 256.

Ordinances or contracts designed to operate throughout the city at large, extend to and operate *within subsequent enlarged municipal limits*. *St. Louis Gas Co. v. St. Louis*, 46 Mo. 121 (1870).

counties, cities, and towns are subject to legislative control. Where a municipal or public corporation is *legislated out of existence and its territory annexed to other corporations*, the latter, unless the legislature otherwise provides, are *entitled to its property*, and severally liable for a proportionate share of its then subsisting legal debts, and vested with the power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing therein. The creditors of the extinguished corporation were held in the case cited in the note to have a remedy *in equity* against the corporations succeeding to its property and powers, to have the amount ascertained, apportioned, and adjudged to be paid.<sup>1</sup>

§ 187 (127). **Property and debts on Division of Town.** — In connection with the power of the legislature to create municipal corporations and to determine their territorial extent, reference may be made to the *division of towns or public corporations* by legislative act or authority. There is no restriction on the general power, unless it be found in the Constitution of the State.<sup>2</sup> In case of division, the legislature may, as we have already seen, *apportion the burden* between the two, and determine the proportion to be borne by each.<sup>3</sup> In Connecticut, "the legislature," says the Supreme Court,

*Recording town plats.* Bemis v. Becker, 1 Kan. 226 ; Mason v. Pitt, 21 Mo. 391 ; Strong v. Darling, 9 Ohio, 201 ; *post*, sec. 628. Where the *power to alter boundaries* is committed to local tribunals their acts must be strictly within the powers granted, otherwise they will be void. Jacksonville v. L'Engle, 20 Fla. 344.

Locality, under the Canadian system of municipal government, is subject to taxation. Each portion of a county therefore should bear its proper proportion of the taxation of the whole county. Where a portion is detached from one and added to another county, some mode of *adjustment of existing liabilities* becomes indispensable. See McKee v. Huron District Court, 1 Upper Can. Q. B. 368 ; North Dumfries, v. The County of Waterloo, 12 Upper Can. Q. B. 507 ; County of Wellington v. Township of Waterloo, 8 Upper Can. C. P. 358 ; County of Wellington v. Township of Wilnot, 17 Upper Can. Q. B. 82. See, also, Windham v. Portland, 4 Mass. 384 ; Hampshire v. Franklin, 16 Mass. 76 ; Plunkett's Creek v. Crawford, 27 Penn. St. 107 ; New London v. Mont-

ville, 1 Root (Conn.), 184 ; North Yarmouth v. Skillings, 45 Me. 133 ; Lakin v. Ames, 10 Cush. 198 ; Brewster v. Harwich, 4 Mass. 278 ; Randolph v. Braintree, 4 Mass. 315 ; Blackstone v. Taft, 4 Gray, 250 ; Hartford Bridge Co. v. East Hartford, 16 Conn. 149 ; East Hartford v. Hartford Bridge Co., 17 Conn. 80 ; Crawford County v. Iowa County, 2 Chand. (Wis.) 14.

<sup>1</sup> Mount Pleasant v. Beckwith, 100 U. S. 514 (1879) ; noted more fully *ante*, sec. 170, note.

<sup>2</sup> *Ante*, chap. iv. secs. 54, 63 ; *supra*, sec. 186. Where part of a township is set off to form another, the two townships are not both new corporations, the old corporation continues as before, and remains chargeable with its former obligations. Courtright v. Brooks Township, 54 Mich. 182.

<sup>3</sup> *Ante*, sec. 63, *et seq.* ; Londonderry v. Derry, 8 N. H. 320 (1836) ; Bristol v. New Chester, 3 N. H. 532 ; Sill v. Corning, 15 N. Y. 297 ; People v. Draper, 15 N. Y. 532 ; Smith v. Adrian, 1 Mich. 495 ; Waring v. Mobile, 24 Ala. 701 ; Mayor v.

"have immemorially exercised the power of dividing towns at its pleasure, and upon such division, apportioning the common property and common burdens in such manner as to it shall seem reasonable and equitable."<sup>1</sup> Accordingly, it may impose on one town, upon such division, the entire expense of erecting and maintaining a bridge across a river which is the dividing line between the two towns.<sup>2</sup>

§ 188 (128). **Property on Division.**—On the *division* of a town or public corporation *possessing corporate property*, into two separate towns or communities, *each*, in the absence of a different provision by the legislature, was considered by the Supreme Court of New York to be *entitled to hold* in severalty *the public property* which fell within its limits.<sup>3</sup> In Connecticut, it is declared to be "well settled

State, 15 Md. 376; *Love v. Schenck*, 12 Ire. Law, 304 (1851); *Love v. Ramsour*, 12 Ire. Law, 328 (1855); *Olney v. Harvey*, 50 Ill. 453; *Sedgwick Co. v. Bailey*, 11 Kan. 631 (1873); *Sangamon County v. Springfield*, 63 Ill. 66 (1873); *Dunmore's Appeal*, 52 Pa. St. 374; *Barklev v. Levee Comm'rs*, 93 U. S. 258 (1876); *Broughton v. Pensacola*, 93 U. S. 266 (1876); *County Court v. County Court*, 2 Bush (Ky.), 93; *Schriber v. Langdale*, 66 Wis. 616; *Knight v. Town of Ashland*, 61 Wis. 233. The parent town, being liable for the whole debt, is the agent of the new town in defending an action on the liability, and when it acts in good faith and with diligence and skill, the new town is bound by the result of the action. *Mt. Desert v. Monmouth*, 72 Me. 348. And see *ante*, chap. iv. for a general view of the *extent of the legislative authority* over public and municipal corporations and their rights, liabilities, property, and contracts; and chap. vii. as to the *dissolution* of municipal corporations and its effect upon their creditors and property.

<sup>1</sup> *Granby v. Thurston*, 23 Conn. 416, 419, *per Waite*, C. J.; *Willimantic Society v. School Society* (division of school societies and funds), 14 Conn. 457; *Hartford Bridge Co. v. East Hartford* (ferry franchise), 16 Conn. 149; affirmed, 10 How. (U. S.) 511, 541; *Laramie County v. Albany County*, 92 U. S. 307 (1875). Legislature cannot control an educational fund raised by individual bounty and not

by taxation (*Plymouth v. Jackson*, 15 Pa. St. 44), or direct a division of the funds between two towns different from that which is prescribed in the will of the donor. *Greenville v. Mason*, 53 N. H. 515 (1873). See also, *Montpelier v. East Montpelier*, 27 Vt. 704; 29 Vt. 12; *ante*, secs. 64, 80, 85, 171.

<sup>2</sup> *Granby v. Thurston*, *supra*; *ante*, sec. 71.

<sup>3</sup> *North Hempstead v. Hempstead*, 2 Wend. 109 (1828). "Suppose," says *Savage*, C. J., delivering the opinion of the court in this case, "the State to be divided into two States: without some special agreement, each would own the public property within its limits. So of counties: the public buildings remain the property of the old county; yet public buildings are as much public property as public lands. So as to the plains, meadows, and marshes which are the subject of this suit. A bill filed by a new county for the partition of the gaol and court-house, which had been common property, would be the same in principle as the bill in this suit. Would not such a suit be considered preposterous? Suppose a religious corporation possessed of a church and parsonage; it becomes expedient to erect part into a new corporation: would not the old corporation retain the property, unless an agreement was made as to the partition of it?" 2 Wend. 109, 135; *Laramie County v. Albany*, 92 U. S. 307 (1875); *West Carroll v. Gaddis*, 34 La. An. 928. Incor-

that when part of the inhabitants and territory of an *older town* are erected into a new corporation, the old town retains all of the property, rights, and privileges formerly belonging to it, and is subject to all its former duties and liabilities, at least as it regards property which has no fixed location in the new town, as lands, buildings, etc." Accordingly, "upon the division of Hartford, no part of the ferry franchise would pass to the new town of East Hartford, except by virtue of a legal provision to that effect."<sup>1</sup> So it has been frequently held that if a new corporation is created out of the territory of an old corporation or if part of its territory or inhabitants is annexed to another corporation,<sup>2</sup> unless some provision is made in the act respecting the property and existing liabilities of the old corporation, the latter will be entitled to all the property, and be solely answerable for all the liabilities.<sup>3</sup>

§ 189 (129). **Power of Legislature to apportion Debts and Property.** — But upon *the division of the old corporation*, and the creation of a new corporation out of part of its inhabitants and territory, or upon the annexation of part to another corporation, the *legislature may provide* for an *equitable appropriation or division* of the property, and impose upon the new corporation, or upon the people and territory, thus disannexed, the obligation to pay an equitable proportion of the corporate debts.<sup>4</sup> The *charters and constituent acts* of

poration of a part of a *town* into a *city*, held not to divest the title of the town to a tract of land owned by it in fee simple, "in trust, for the use of the town forever." *Milwaukee v. Milwaukee*, 12 Wis. 93.

In *Michigan*, it is held that when a city is incorporated from part of the territory of a township the property rights of the township are not affected unless provision is made therefor by statute. *Board of Health v. East Saginaw*, 45 Mich. 257.

<sup>1</sup> *Per Church, J.*, in *Hartford Bridge v. East Hartford*, 16 Conn. 149, 171 (1844); affirmed by Supreme Court of the United States, 10 How. (U. S.) 511, 541. Approving *Windham v. Portland*, 8 Mass. 384; *Hampshire v. Franklin*, 16 Mass. 76; *North Hempstead v. Hempstead*, 2 Wend. 109; *ante*, sec. 9.

<sup>2</sup> *Windham v. Portland*, 4 Mass. 384 (1808); *Richards v. Daggett*, 4 Mass. 539; *Hampshire v. Franklin*, 16 Mass. 76 (1819); *Richland County v. Lawrence*, 12 Ill. 1 (1850); *Blackstone v. Taft*, 4 Gray,

250 (1855); *North Yarmouth v. Skillings*, 45 Me. 133, 142 (1858); *Cobb v. Kingman*, 15 Mass. 197; *Minot v. Curtis*, 7 Mass. 441, 445; Opinion of Supreme Judges, 6 Cush. 575; *Ib.* 578; *Laramie County v. Albany County*, 92 U. S. 307 (1875), where the cases are cited, and the subject learnedly discussed by *Clifford, J.* *Greenville v. Mason*, 53 N. H. 515 (1873); *Depere v. Bellevue*, 31 Wis. 120 (1872); s. c. 11 Am. Rep. 602.

<sup>3</sup> Text cited and approved. *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Turnbull v. Alpena School Dist.*, 45 Mich. 496.

<sup>4</sup> *Gorham v. Springfield*, 21 Me. 61; *North Yarmouth v. Skillings*, 45 Me. 133 (1858); *Brewster v. Harwich*, 4 Mass. 278; *Ib.* 315; *Ib.* 384; *Harrison v. Bridgton*, 16 Mass. 16; *Ib.* 76 (1819); *Lakin v. Ames*, 10 Cush. 198 (1852). See *School District v. Richardson*, 23 Pick. 62 (1839), as to the effect in *Massachusetts* upon the title to property of the abolition of old *school districts* and the formation of new

public and municipal corporations are not, as we have before seen, contracts, and *they may be changed at the pleasure of the legislature,*

ones; followed by *School District v. Tapley*, 1 Allen, 49; but a *dictum* therein questioned by *Hoar*, J. *Simmons v. Nahant*, 3 Allen, 316, as to necessity of a deed of conveyance for real estate. *Sanbornton v. Tilton*, 55 N. H. 603 (1875); s. c. 53 N. H. 438; *Tilton v. Sanbornton*, 55 N. H. 610. Note relating to division of property under legislative act. *Southampton v. Fowler* (Little Islands on division of town), 52 N. H. 225 (1872); *Tileson v. Newman*, 23 Vt. 421; *Richards v. Daggett*, 4 Mass. 534; *Waldron v. Lee*, 5 Pick. 323. In *Pennsylvania* it was held that on a division of a township, each fraction remains liable for the whole debt due by the old township; if one pays the whole amount, it lays the foundation for contribution. *Plunkett Township v. Crawford*, 27 Pa. St. 107 (1856). See *New London v. Montville*, 1 Root (Conn.), 184; *Hughes v. School District*, 72 Mo. 643. On annexation of a portion of a township to a city, the residue retains all its property, real and personal, unless a different disposition has been made by the terms of the division. *People v. School Trustees*, 86 Ill. 613. As to right to collect taxes on such division, see *Barnett Township v. Jefferson County*, 9 Watts, 166; *Devor v. McClintock*, 9 Watts & S. 80; *Police Jury, &c. v. McCormack*, 32 La. An. 624; sustaining text, *Board, &c. v. Board, &c.*, 30 W. Va. 424 (1887). In *Morgan v. Town of Waldeck*, 17 Fed. Rep. 286, it appeared that the town, which had been carved out of another, had, through its officers and people, repeatedly recognized its liability for its portion of the debt of the town out of which it was created, and it was decided that it was liable for its proportion of the debt, although there was doubt whether the proceedings in setting it off were legal.

As to *support of poor* in case of division. *North Whitehall v. South Whitehall*, 3 Serg. & Rawle (Pa.), 117; *Overseers, &c. v. Overseers, &c.*, 2 Ib. 422; *Stillwater v. Green*, 4 Halst. (N. J.) 59.

Where there has been an *insufficient legal division* and organization of a new district, this may be afterwards *ratified*

and made binding. *Sawyer v. Williams*, 25 Vt. 311; *Pierce v. Carpenter*, 10 Vt. 480; *Alden v. Rounsville*, 7 Met. 219.

Unless otherwise provided by legislation the *detachment of territory from a township* does not affect its ownership of anything but lands; debts and other incorporeal rights—as here, liquor taxes previously due—still belong to the township. *Springwells v. Wayne County*, 58 Mich. 240.

The *mode of proceeding*, under the statute of *New York*, in the division of old and the erection of new towns, the *directory* nature of the statute as to mode of proceeding, and the presumption in favor of the regularity of the proceedings, are clearly set forth in the case of *The People v. Carpenter*, 24 N. Y. 86.

As illustrating the *directory* nature of such statutes, see *Elmendorf v. Mayor*, 25 Wend. 693; *Striker v. Kelly*, 7 Hill (N. Y.), 9. But an agreement in such division, transcending the powers of the officers who make it, is not binding on the town. *Overseers v. Same*, 18 Johns. 382. Effect of erection of a *new* out of a portion of an old county on the *terms* of officers who respectively *reside* in the new and old portions, see *People v. Morrell*, 21 Wend. 563 (1839), and authorities cited by *Cowen*, J., p. 580. County commissioners must, by law, *reside* in the county, and on the erection of a new county in which their residence is included they become *residents* of the *new* county and non-residents of the old county, and cannot legally act for it, unless they remove within it; though if they continue to act without such removal their acts are valid, being officers *de facto*. *State v. Harts-horn*, 17 Ohio, 135; *State v. Jacobs*, *Ib.* 143. A bill in equity will not lie to *set aside a settlement of accounts* made by two boards of supervisors upon the division of a township by creating a new one, on the ground that one of the boards was inferior to the other in ability and experience, or that it was misled as to the financial condition of its own township. The law presumes such a board to be competent to transact the business entrusted to it.



subject only to the restraints of special constitutional provisions, if any there be. And it is an ordinary exercise of the legislative dominion over such corporations to provide for their enlargement or division; and, incidental to this, to apportion their property and to direct the manner in which their debts or liabilities shall be met, and by whom. The opinion has been expressed that the partition of the property *must be made at the time of the division* of, or change in, the corporation, since otherwise the old corporation becomes, under the rule just before stated, the sole owner of the property, and hence cannot be deprived of it by a *subsequent* act of the legislature.<sup>1</sup> But, in the absence of special constitutional limitations upon the legislature, this view cannot, perhaps, be maintained, as it is inconsistent with the necessary supremacy of the legislature over all its corporate and unincorporate bodies, divisions, and parts, and with several well-considered adjudications.<sup>2</sup>

§ 190 (130). **Corporate Seal; Power to adopt and alter.** — The charters of municipal corporations usually contain a clause authorizing them *to have and use a common seal*, and to *alter* the same at pleasure. Without an express grant it is, however, incident to every corporation to adopt and use a corporate seal. The essential importance which the common law anciently attached to seals, and the modern relaxation of the rule, are well known. Respecting seals, the same general principles apply to private and to municipal corporations. Thus, a corporation of the latter class would doubtless be bound equally with a private corporation by any seal which has been *authoritatively affixed* to an instrument requiring it, though it be not the seal regularly adopted.<sup>3</sup> On the other hand, it would not be

Township of Churchill v. Township of Cummings, 51 Mich. 446.

<sup>1</sup> Hampshire v. Franklin, 16 Mass. 76; Windham v. Portland, 4 Mass. 390; Bowdoinham v. Richmond, 6 Greenl. (Me.) 112, holding that subsequent legislation could not change the apportionment of the debts between an old town and one created from it, since such an apportionment was in the nature of a contract. But see, *ante*, chap. iv. secs. 64, 75.

<sup>2</sup> Layton v. New Orleans, 12 La. An. 515 (1857), cited, *ante*, sec. 63; Laramie County v. Albany County, 92 U. S. 307 (1875); Dunmore's Appeal, 52 Pa. St. 374. In this last case one borough was divided into four, and the legislature was held to have the power afterwards to pro-

vide for an equitable adjustment of the indebtedness among them all, by commissioners to be appointed by a designated court, and from whose determination no appeal was allowed. As to extent of legislative control over public and municipal corporations, and their rights, liabilities, property, and contracts, see *ante*, chap. iv. and cases there cited; Cooley, Const. Lim. 193, 231, 232; *ante*, secs. 172, 173; *post*, chapter on Taxation.

<sup>3</sup> Bank, &c. v. Railroad Co., 30 Vt. 159 (1858), per Redfield, C. J.; Tenney v. Lumber Co., 43 N. H. 343; Mill Dam Foundry v. Hovey, 21 Pick. 417; Porter v. Railroad Co., 37 Me. 349; Angell & Amos, Corp. sec. 217; Phillips v. Coffee, 17 Ill. 154; Stebbins v. Merritt, 10 Cush.

bound by the affixing of either the regular or temporary seal by a person not legally and duly authorized.<sup>1</sup> So, under the modern doctrine, a corporation can do an act *in pais* by an attorney in fact, and such attorney need not necessarily be appointed under seal.<sup>2</sup>

§ 191 (131). **Seal, how proved.**—The seal of a private corporation attached to an instrument *does not prove its own authenticity*; but it should be shown by evidence *aliunde* to be really the seal of the corporation.<sup>3</sup> The same doctrine is, probably, applicable to the seal of a municipal corporation, except where changed by charter or statute, although it seems that it is usual in England to allow deeds and other instruments relating to real estate to go to the jury when authenticated by the corporate seals of London, Edinburgh, or Dublin,—these being corporations of great antiquity, or recognized by the legislature.<sup>4</sup> The corporate seal attached to an instrument, attested by the signatures of the proper officers, is *prima facie* but not conclusive evidence that it was lawfully placed there, and that the instrument is the act of the corporation.<sup>5</sup>

27; *City Council v. Moorehead*, 2 Rich. Law, 430; *Grant on Corp.* 59, and cases; and note author's opinion and his doubt as to the existence of any common law right to change the common seal. An impression of a corporate seal stamped upon and into the substance of the paper containing the instrument is sufficient, without wafer or wax. *Hendee v. Pinkerton*, 14 Allen, 381.

<sup>1</sup> *Koehler v. Iron Co.*, 2 Black, 715 (1862); *Bank of Ireland v. Evans*, 32 Eng. Law & Eq. 23. "But where a corporation is created by an act for particular purposes with special powers, then another question arises; their deed, though under their corporate seal, and that regularly affixed, does not bind them if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*; that is, that the legislature meant that such a deed should not be made." *Per Parke, B.*, in *South Yorkshire Railway Co. v. Great Northern Railway Co.*, 9 Ex. 55, 84; adopted by *Martin, B.*, in *Payne v. Brecon*, 3 H. & N. 579. See also *Holdsworth v. Dartmouth*, 11 A. & E. 490; *Regina v. Lichfield*, 4 Q. B. 893; *Pallister v. Graves-*

*end*, 9 C. B. 774; *Nowell et al. v. Worcester*, 9 Ex. 457; *Kendall v. King*, 17 C. B. 483.

<sup>2</sup> *Curry v. Bank*, 8 Porter (Ala.), 361 (1839); *Lathrop v. Bank*, 8 Dana, 114; *Abby v. Billups*, 35 Miss. 618.

<sup>3</sup> *Den v. Vreelandt*, 2 Halst. (N. J.) 352 (1800); *Gilbert, Ev.* 19; *Jackson v. Pratt*, 10 Johns. 381; *Moises v. Thornton*, 8 Term R. 303; *City Council v. Moorehead*, 2 Rich. (S. C.) Law, 430; *Foster v. Shaw*, 7 Serg. & Rawle (Pa.), 163; *Id.* 318; *Mann v. Pentz*, 2 Sandf. Ch. 257.

<sup>4</sup> *Per Kinsey, C. J.*, *Den v. Vreelandt*, 2 Halst. (N. J.) 352.

<sup>5</sup> *Levering v. Mayor*, 7 Humph. (Tenn.) 553 (1847); *Memphis v. Adams*, 9 Heisk. (Tenn.) 518 (1872); *Abbott, Corp. Digest*, tit. *Seal*, p. 725, sec. 56, and the many cases there cited; *Benedict v. Denton Walk*, Ch. 336; *Railway Co. v. Railway Co.*, 9 Exchq. 55, 84; *Musser v. Johnson*, 42 Mo. 74. In *Iowa*, the county seal held to be essential to the validity of a county warrant. *Prescott v. Gouser*, 34 Iowa, 178; *Springer v. Clay Co.*, 35 Iowa, 243; *Smeltzer v. White*, 92 U. S. 390 (1875).

§ 192 (132). **Seal, where not necessary.** — The modern rule is that corporations may be bound by *contracts not under seal*, and the circumstances under which they will be bound have been stated by Story, J., in terms which have been approved by the courts of nearly every State in the Union. "Wherever a corporation is acting within the scope of the legitimate purposes of its institution, all *parol* contracts made by its authorized agents are *express* promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise *implied* promises, for the enforcement of which an action lies."<sup>1</sup>

<sup>1</sup> Bank of Columbia v. Patterson, 7 Cranch (U. S.), 299, 306 (1813); Bank v. Wister, 2 Pet. 318; Davenport v. Insurance Co., 17 Iowa, 276; Ring v. Johnson County, 6 Iowa, 265; Over v. Greenfield, 107 Ind. 231. See further, Chaps. on Contracts and Property, *post*, secs. 459, 936. Corporate seal affixed to the note of the corporation makes it a specialty, having in this respect the same effect as the seal of a natural person. Clarke v. Farmers', &c. Co., 15 Wend. 256; *Ib.* 265; Benoist v. Carondelet, 8 Mo. 240; Sturtevant v. Alton, 3 McLean, 393. But corporate seals attached to municipal bonds payable to order or bearer do not destroy or affect their negotiability. See *post*, chap. xiv. on Contracts. Lease

held void for want of the corporate seal. Kinzie v. Chicago, 2 Scam. (Ill.) 188. But otherwise of an authorized agreement by an agent of a corporation to sell lands (Legrand v. The College, 5 Munf. (Va.) 324), or authorized assignment of a lease. Sanford v. Tremlett, 42 Mo. 384. Corporate seal to conveyance by county commissioners. Bestor v. Powell, 2 Gilm. (7 Ill.) 126. Further, see Index — "Seal." Mr. Broom gives an excellent view of the exceptions to the rule that corporations must contract by deed, as recognized and established by the modern English decisions. Broom, Com. on Com. Law, 562-569. Seals in connection with *municipal bonds*. See chapter xiv. on Contracts, *post*.

## CHAPTER IX.

## MUNICIPAL ELECTIONS AND OFFICERS.

§ 193 (133). **Subject outlined.** — In considering the Creation and Constitution of Municipal Corporations, we have now reached, in its order, the subject of MUNICIPAL ELECTIONS AND OFFICERS. It will be treated under the following heads: —

1. Municipal Popular Elections — secs. 195–199.
2. Special Tribunal to determine Election Contests for Municipal Offices — secs. 200–205.
3. Power to create and appoint Municipal Officers — secs. 206–213.
4. Oath and Official Bond of Municipal Officers — secs. 214–216.
5. Duration of Official Term of Municipal Officers — secs. 217–221.
6. Vacancies in Municipal Offices — sec. 222.
7. Refusal to serve in Municipal Offices — sec. 223.
8. Resignation of Municipal Officers — secs. 224–228.
9. Compensation of Municipal Officers — secs. 229–234.
10. Liability of the Corporation to the Officer. Right of Officer to salary — sec. 235.
11. Liability of the Officer to the Corporation and to Others — sec. 236.
12. Amotion and Disfranchisement — secs. 238–256.

§ 194. **Municipal Popular Elections.** — *Elections must be held at the time and place provided by the charter or by statute.* Where the law fixes no time, but leaves the time and place to be fixed by some authority named therein, it is essential to the validity of the election that it be called and the time and place thereof fixed by the agency designated by law, and none other; as where the mayor and city council are the designated authority, neither the mayor alone nor the council alone has power to call such an election; if either neglect its duty, *mandamus* is the remedy.<sup>1</sup>

<sup>1</sup> *Stephens v. People*, 89 Ill. 337; 15 Cal. 221; *People v. Harvey*, 58 Cal. Glencoe v. People, 78 Ill. 382; *Dickey v.* 337; *Juker v. Commonwealth*, 20 Pa. St. Hurlbut, 5 Cal. 343; *People v. Murray*, 484; *Chadwick v. Melvin*, 68 Pa. St.

§ 195 (134). **Ballot; Qualification of Voters; Residence.** — Elections by the people, with exceptions in a few States, are by *folded or secret ballot*, and not open or *viva voce*.<sup>1</sup> The *qualifications of electors or voters* are fixed by the Constitution and laws, and cannot be changed by any ordinance or act of the corporation.<sup>2</sup> *Residence for a certain period within the municipality* is almost invariably required in express terms, as one of the qualifications of the right to vote at elections therein and as one of the conditions of eligibility to hold a municipal office. Non-residents of the corporation have, however, been held competent to be elected to office when residence was not expressly required, but the decisions cannot, perhaps, be

333; Knowles v. Yates, 31 Cal. 82; Clarke v. Board, &c., 27 Ill. 310; Miller v. English, 1 Zab. (21 N. J. L.) 317; Marshall v. Cook, 38 Ill. 44; Marshall v. Kerns, 2 Swan (Tenn.), 68; Force v. Batavia, 61 Ill. 99; Foster v. Scarf, 15 Ohio St. 535. As to *mandamus* to compel the holding of an election, see *post*, secs. 197, 838, 839. If such an election is held it is void, and cannot be ratified by the municipal authorities. Stephens v. People, *supra*. An election is not complete and the candidate is not qualified to serve unless the requirements of the statutes providing a mode for determining and declaring the result of the election have been complied with. People v. Crissey, 91 N. Y. 616; People v. North, 72 N. Y. 124 (1878).

<sup>1</sup> Cooley, Const. Lim. chap. xvii. 598, where the subject of popular elections, the right to participate therein, the conditions necessary to the exercise of the right, the manner of voting, the conduct and sufficiency of elections are satisfactorily presented. The rules and doctrines deduced from the cases are, in general, applicable to popular municipal elections. *Ante*, sec. 39. A ballot implies absolute secrecy, and where the Constitution of a State declares that "all elections by the people shall be by ballot," the legislature cannot by law require the outside of the ballot to be numbered so as to correspond with the number placed opposite the name of the voter on the poll list. Williams v. Stein, 38 Ind. 89 (1871); s. c. 10 Am. Rep. 97.

In 1872, Parliament passed a *Ballot Act*, which with modifications is embraced

in the Municipal Corporations Act of 1882, 45 and 46 Vic. chap. 50, referred to in a previous chapter. In 1869, it passed a Municipal Corporations Election Act, and in 1872 the Corrupt Practices (Municipal Elections) Act, and in 1877 the Municipal Corporations New Charters Act, and in 1878 the Registration Act, by which the subject of elections is minutely regulated. These Acts contain many provisions which are worth the study of the American legislator. Pol. Science Quarterly, vol. iii. 664-676 (Decr., 1888); *Ib.* vol. iv. p. 204 *et seq.* (June, 1889).

<sup>2</sup> Petty v. Tooker, 21 N. Y. 267; Commonwealth v. Woelper, 3 Serg. & Rawle (Pa.), 29; People v. Phillips, 1 Denio (N. Y.), 388; Rex v. Spencer, 3 Burr. 1827; Rex v. Mayor of Weymouth, 7 Mod. 371; Newling v. Francis, 3 T. R. 189; Rex v. Chitty, 5 Ad. & E. 609; Rex v. Bumstead, 2 B. & Ad. 699. The provision of the Constitution that "every male person twenty-one years old, resident in the State twelve months and in the county *thirty* days, shall be an elector," applies in corporated cities, and disables the legislature from requiring *ninety* days residence in a city as a qualification for voting for city officers. People v. Canaday (charter of Wilmington), 73 N. C. 198 (1875); s. c. 21 Am. Rep. 465. *Ante*, sec. 39, note; *post*, sec. 207. A charter provision requiring the *registration of the voters* in a city held constitutional. McMahon v. Savannah, 66 Ga. 217. As to the qualifications of voters for city officers under the Constitution of *Rhode Island*, see *In re* the Newport Charter, 14 R. I. 655.

said to conclude the point,<sup>1</sup> and, if extended to the higher offices, are hardly consistent with the fundamental idea of municipal or local self-government.

<sup>1</sup> Municipal officers may be elected from non-residents of the corporation when there is no statute or Constitution prohibiting it, particularly when the office to be filled is one requiring professional skill, and not representative or legislative in its character. *State v. Blanchard* (city surveyor), 6 La. An. 515 (1851). The conclusion was reached with hesitation, but the whole court concurred. *Ib.* *State v. George*, 23 Fla. 585 (1887). So in *The State v. Swearingen*, 12 Ga. 23 (1852), it was decided where the charter of the town provided "for the election of city officers by the people of the city qualified to vote," and was silent as to requiring the officers to be residents, that a person might legally be elected and qualified who was not a resident of the place. Residence as a qualification for municipal office. See *Commonwealth v. Jones*, 12 Pa. St. 365.

As to residency and inhabitancy, and who are residents. *Cohen v. Wigfall*, 8 Rich. Law, 237; 2 *Ib.* 489; *Gildersleeve v. Alexander*, 2 Speer (S. C.), 298; *Seay v. Hunt*, 55 Tex. 545. In England by the *Municipal Corporations Act* (sec. 9), inhabitant householders resident within the borough, or within seven miles of the borough, and rated to the relief of the poor, are made burgesses or citizens. Before that act was passed, residence in the freeman or citizen was sometimes required to render him eligible to office, although non-residents, wherever residing, might, by a similar perversion of the purposes of a municipal corporation, be admitted to freedom or membership, unless expressly restrained by the charter; and if residence was expressly required as a condition of eligibility, it was not necessary that the officer should continue to reside in the place while holding the office. Not only so, but it was held that where residence was necessary as a qualification during office, it was not, by implication, necessary that the person elected should have been a resident at the time of the election. And when inhabitancy was requisite, it meant not merely residence, but keeping a house within the place, and

paying scot and lot. *Willcock on Munic. Corp.* 188, pl. 472; *Ib.* 191, pl. 481; *Ib.* 193, 488; *Rex v. Monday*, Cowp. 539; *Rex v. Mallet*, 2 Barnard. 408; *Rex v. Cambridge*, 4 Burr. 2008; *Rex v. Heath*, 1 Barnard. 417. These rules seem to the author of very doubtful application in this country, since here all of the inhabitants are members of the corporation, and non-residents cannot become such. See on this point opinion of *Read, J.*, in *People v. Canaday*, *supra*. *Ante*, chap. 1. And, in general, it may be said that a person is an inhabitant or resident who has his domicile or home in the place; but it is foreign to the purpose of this work to enter into the difficult questions which have arisen with respect to residency and domicile. *Hinds v. Hinds*, 1 Iowa, 36; *Story*, Conf. Laws, sec. 43; *Putnam v. Johnson*, 10 Mass. 488; *Thorn-dike v. Boston*, 1 Met. (Mass.) 245. Public officers vacate their office by permanent removal from territorial limits of the corporation. *Barre v. Greenwich*, 1 Pick. (Mass.) 120; *Rumsey v. Campton*, 16 N. H. 567; *Giles v. School District*, 11 Fost. (31 N. H.) 304; *infra*, sec. 228. But a temporary removal with an intention to return, will not, of itself, have this effect. *Van Orsdall v. Hazard*, 3 Hill (N. Y.), 243 (1842); *People v. Metropolitan Police Board*, 19 N. Y. 201; *Lyon v. Commonwealth*, 3 Bibb (Ky.), 430; *Rex v. Exeter*, Comb. 197; *Hannon v. Grizzard*, 89 N. C. 115.

"Nice questions," says Mr. Harrison (*Munic. Manual for Upper Canada*, 2d ed. 60, note), "arise as to when a party can or cannot be said to be a resident of a municipality." *Attorney-General v. Parker*, 3 Atk. 576; *Etherington v. Wilson*, L. R. 1 Ch. Div. 160; *King v. Foxwell*, L. R. 4 Ch. Div. 518. A man cannot, within the meaning of the municipal laws of Canada, be said to be resident in two municipalities at the same time. *Marr v. Vienna*, 10 Upper Can. L. J. 275. A man's residence is where his home is situate, — where his family live. *The King v. Inhabitants of North Curry*, 4 B. & C.

§ 196 (135). **Electing disqualified Person.**—The choice of a disqualified person is ineffectual. Thus, if the law requires freeholders to be chosen for certain offices, the election of a person not a freeholder is void.<sup>1</sup> But unless the votes for an ineligible person are expressly declared to be void the effect of such a person receiving a majority of the votes cast is, according to the weight of American authority, and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be held, and not to give the office to the qualified person having the next highest number of votes.<sup>2</sup>

959. An occasional absence from his home to attend to business in another municipality does not make his home less his residence. *Withorn v. Thomas*, 7 M. & G. 1. Where A. had a dwelling-house at Bowmanville, where his wife and family lived, but had a saw-mill and store and was postmaster in the township of Cartwright, which occasioned him frequently to visit that place, and who, while there, used to board with one of his men in a house owned by himself,—*Held*, that after voting in Bowmanville, he had no right to vote in Cartwright. *The Queen, ex rel. Taylor v. Caesar*, 11 Upper Can. Q. B. 461. *Infra*, sec. 198, note. Mere colorable residence is in no case sufficient. *The King v. Duke of Richmond*, 6 T. R. 560. Each case must, to a great extent, depend on its own circumstances. As to what is sufficient, see *The King v. Sergeant*, 5 T. R. 466; *Bruce v. Bruce*, 2 B. & P. 229; *The King v. Mitchell*, 10 East, 511; *Withorn v. Thomas*, 7 M. & G. 1; *The Queen, ex rel. Forward v. Bartels*, 7 Upper Can. C. P. 533; *Queen v. Boycott*, 14 L. T. N. S. 599; *Queen v. Exeter*, L. R. 4 Q. B. 110; *Manning v. Manning*, L. R. 2 P. & D. 223; *Taylor v. Parish, &c.*, L. R. 6 C. P. 309; *Bond v. St. George*, L. R. 6 C. P. 312; *Queen v. St. Ives*, L. R. 7 Q. B. 467; *Durant v. Carter*, L. R. 9 C. P. 261; *Ford v. Pye*, L. R. 9 C. P. 269; *Ford v. Hart*, L. R. 9 C. P. 273; *Wilton v. Falmouth*, 3 Shep. 479; *State v. Decasinova*, 1 Tex. 401; *State v. Frost*, 4 Harring. 558; *Fry's Election*, 71 Pa. St. 302; s. c. 10 Am. Rep. 698.

<sup>1</sup> *Spear v. Robinson*, 29 Me. 531

(1849); *State v. Swearingen*, 12 Ga. 23 (1852); *State v. Gastinel*, 20 La. An. 114 (1868); see also, *State v. Newman*, 91 Mo. 445; *State v. Trumpf*, 50 Wis. 103.

<sup>2</sup> *State v. Swearingen*, 12 Ga. 23; *Sublett v. Bedwell*, 47 Miss. 266; s. c. 12 Am. Rep. 338; *State v. Giles*, 1 Chand. (Wis.) 112; *State v. Smith*, 14 Wis. 497; *Saunders v. Haynes*, 13 Cal. 145; *State v. Gastinel* (under charter), 20 La. An. 114; *Cooley, Const. Lim.* 620; *Commonwealth ex rel. McLaughlin v. Cluley* (Sheriff), 56 Pa. St. 270 (1868); *People v. Clute*, 50 N. Y. 451 (1872); s. c. 10 Am. Rep. 508; *Wood v. Bartling*, 16 Kan. 109, 114 (1876). *Infra*, secs. 198, note, 199, note. The following points are ruled in *People v. Clute, supra*. Where a majority of the electors, through ignorance of the law or the fact, vote for one ineligible to the office, the votes are not nullities; but while they fail to elect, the office cannot be given to the qualified person having the next highest number of votes. The election is a failure, and a new election must be had. A minority of the whole body of qualified electors may elect to an office where the majority decline to vote, or where they vote for one who is ineligible to the office, knowing of the disqualification. Notice of the disqualifying fact, and of its legal effect, may be given so directly to the voter as to charge him with actual knowledge of the disqualification; or the disqualifying fact may be so patent or notorious as that his knowledge of the ineligibility may be presumed as matter of law. But not only the fact which disqualifies, but also the rule or enactment of law which makes it thus

§ 197 (136). **Unauthorized Election; Notice.**—Where it is discretionary with the municipal authorities whether they will hold an election or not, votes at an *unauthorized election* are simply nullities.<sup>1</sup> Elections *fixed by law at a certain time and place* may be legally holden, although *notice* has not been published or given; but if the time be not defined by statute, and is to be fixed by notice, the notice required is imperative.<sup>2</sup> Time and place are generally essential, but many of the details as to the conduct of elections are usually regarded as directory.<sup>3</sup> ♦

effectual, must be brought home so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it in order to render his vote a nullity.

But in *Indiana* the view is taken that, whether an election, because of the ineligibility of the candidate receiving the highest number of ballots, is a failure, and must be held over, or whether the highest eligible candidate is elected, depends upon circumstances: 1. If the candidate receiving the highest number of votes is ineligible, but from a cause *unknown* to the voters, and which they were *not bound to know*,—as, for example, infancy, want of naturalization, and the like,—the result is a failure, and there must be another election. 2. If the voters know, or are bound to know, the ineligibility of a candidate, the election is not a failure, as the eligible candidate receiving the highest number of votes is legally elected. 3. Where the ineligibility of a candidate arises from his holding, or having held, a public office, the people within the jurisdiction of such office are held in law to know—are chargeable with notice of—such ineligibility, and votes given for such a candidate are of no effect, and his highest eligible competitor is elected. *Gulick v. New*, 14 Ind. 93, 102 (1860), *per Perkins, J.*; commenting on *State v. Swearingen* (case of non-residency), 12 Ga. 23; *Price v. Baker*, 41 Ind. 572 (1873); *s. c.* 13 Am. Rep. 346, where the extent of this rule is stated by *Downey, J.* Opinion of Judges, 38 Me., appendix, where a portion of the people voted for a person not in being. *State v. Giles*, 1 Chand. (Wis.) 112.

In *England*, candidates are previously nominated and known, and the votes, un-

til recently, have been open, and there are cases there which decide or favor the proposition, that votes for a disqualified person, given after notice of disqualification, are thrown away, and the other candidate is elected. *Grant on Corporations*, 203-208, and cases cited. But see, as to disqualification and notice, *Regina v. Hiorns*, 7 Ad. & E. 960; *Regina v. Councillors of Derby*, 7 Ad. & E. 419; and particularly *Regina v. Mayor of Tewkesbury*, Law Rep. 3 Q. B. 629 (1868); *Regina v. Ledyard*, 8 Ad. & E. 535; *Rawlinson on Corporations* (5th ed.), 64, note, and authorities. "The principle of these decisions," says the *London Law Times*, January 25, 1873, "must be materially affected by secret voting." This subject was much discussed in the debates before the Electoral Commission created by Congress to decide the presidential contest of 1876. In 1872, Parliament passed a Ballot Act, applicable to municipalities. Ballot papers are to be provided by the mayor, and the form thereof is prescribed.

<sup>1</sup> *Opinions of Judges*, 7 Mass. 525; *Same*, 15 Mass. 537; *Cooley, Const. Lim.* 603; *People v. Mathewson*, 47 Cal. 442 (1874); *George v. Oxford Township*, 16 Kan. 72, 80 (1876); *Force v. Batavia*, 61 Ill. 99; *Marshall v. Silliman*, 61 Ill. 218; *Wiley v. Silliman*, 62 Ill. 170; *Harding v. R. I. & St. L. R. R. Co.*, 65 Ill. 90; *People v. Santa Anna*, 67 Ill. 57. *Ante*, sec. 194.

<sup>2</sup> *Cooley, Const. Lim.* 303, and cases cited; *People v. Brenham*, 3 Cal. 477 (1851); *People v. Fairbury*, 51 Ill. 149 (1869). *Computation of time of notice.* *Queen v. Justices*, 8 Ad. & E. 173; *Mitchell v. Foster*, 9 Dowl. P. C. 527; *Warsop v. Hastings*, 22 Muir. 437.

<sup>3</sup> *Dickey v. Hurlbut*, 5 Cal. 343; *Peo-*



Courts are anxious rather to sustain than to defeat the popular will.<sup>1</sup>

ple v. Knight (essentialness of place), 13 Mich. 424; Gass v. State, 34 Ind. 425 (1870). Where the legislature provided that the polls of the different wards *should be kept open* until 10 o'clock P. M. and they were closed at 8 o'clock, the election was set aside. Pennsylvania District Election, 2 Par. (Pa.) 526; Clark's Case, *Ib.* 521. Illegal adjournment of election to a *different place* from the one designated in the notice. Commonwealth v. Commissioners, &c., 5 Rawle (Pa.), 75. Where an election is held on a *day subsequent* to that named in the charter, the acts of officers thus elected are valid, as respects the public and third persons, and cannot be collaterally inquired into. Coles County v. Allison, 23 Ill. 437, distinguished from Haynes v. Washington County, 19 Ill. 66, and approved in People v. Fairbury, 51 Ill. 149 (1869). As to election held on a day prior to the date provided by law, see People v. Keeling, 4 Col. 129. Title of officers elected before the legal incorporation of a place may be validated by the legislature. State v. Kline, 23 Ark. 587; *post*, secs. 256, 276, 892, note.

It is a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election. Commonwealth v. Smith, 132 Mass. 289; Walker v. West Boylston, 128 Mass. 550; The Queen v. The Rector of St. Mary, Lambeth, 8 Ad. & E. 356; Regina, *ex rel.* Walker v. Mitchell *et al.*, 4 Upper Can. P. R. 218; Monk Election, *In re*, 32 Upper Can. Q. B. 147; The Queen v. Plenty, L. R. 4 Q. B. 346; The Queen v. Ward, L. R. 8 Q. B. 210; Regina v. Cousins, 28 L. T. N. S. 116; Regina, *ex rel.* Harris v. Bradburn, 6 Upper Can. P. R. 308; Regina, *ex rel.* Preston v. Touchburn, *Ib.* 344; Shaw v. Thompson, L. R. 3 Ch. Div. 233; People v. Cook, 14 Barb. (N. Y.) 259; Clifton v. Cook, 7 Ala. 114; Truehart v. Addicks, 2 Tex. 217; Dishon v. Smith, 10 Iowa, 212; Atty. Gen. v. Ely, 4 Wis. 420; State v. Jones, 19 Ind. 356; People v. Higgins, 3 Mich. 233; Gorham v. Campbell, 2 Cal. 135;

Taylor v. Taylor, 10 Minn. 112; Bourland v. Hildreth, 26 Cal. 161; Day v. Kent, 1 Oreg. 123; Piatt v. People, 29 Ill. 54; Ewing v. Filley, 43 Pa. St. 384; Howard v. Shields, 16 Ohio St. 184; McKinney v. O'Connor, 26 Tex. 5; Sprague v. Norway, 31 Cal. 173; Fry v. Booth, 19 Ohio St. 25. But where it appears that the irregularity is of such character and of such magnitude that it may have affected the result, the election ought to be set aside. Hackney Election, 31 L. T. N. S. 69; Woodward v. Sarsons, L. R. 10 C. P. 743; Mather v. Brown, L. R. 1 C. P. Div. 596; Johnson v. Lambton, 40 Upper Can. Q. B. 297; Harrison's Municipal Manual, 4th ed.

"If rioting takes place to such an extent that ordinary men, having the ordinary nerve and courage of men, are thereby prevented from recording their votes, the election is void by the common law, for the common law provides that an election should be free in the sense that all persons shall have an opportunity of coming to the poll and voting without fear or molestation." Nottingham, *In re*, 1 O'M. & H. 245; Stafford, *In re*, *Ib.* 234; Drogheda, *In re*, *Ib.* 252. The freedom of elections is of the utmost importance. Any attempt to interfere with the electors in the peaceable and quiet exercise of their rights or to improperly influence them against their judgment or desire is a crime; and in addition to the ordinary punishment of the crime of bribery of an elector it is a constitutional provision in many States that whoever shall be convicted of the crime shall forfeit the right to any office of profit or trust under the State. McCrary, Elections, sec. 432.

<sup>1</sup> Skerritt's Case, 2 Par. (Pa.) 516; Boileau's Case, 2 Par. (Pa.) 505; Carpenter's Case, 2 Par. (Pa.) 537; New Orleans v. Graihle, 9 La. An. 573; Clifton v. Cook, 7 Ala. 114; People v. Cook, 14 Barb. (N. Y.) 259; 8 N. Y. 67; Regina v. Touchburn, 6 Upper Can. P. R. 344; United States v. Memphis, 97 U. S. 284, approving text. The rule as therein stated is regarded by Mr. Justice Cooley, as "an

§ 198 (137). **Subject illustrated.**—Thus, *an inaccurate designation of the name of the office* voted for,—as, for example, “Police Justice,” instead of “Police Magistrate” (the term used in the statute),—will not render the votes invalid, where the legislative provisions make clear the intention of the voters in thus casting their ballots,—to which intention effect should be given.<sup>1</sup> But if a specific number of officers only can be chosen,—for example, *four*,—ballots containing the names of *more* than four persons for the office in question must be rejected. Any other doctrine might result in giving the elector two votes. There are usually two competing tickets, and if an elector can, in the case supposed, cast a ballot containing *five* names, he may one of *eight*, and thus vote (if he chooses to insert the names) for both tickets.<sup>2</sup>

eminently proper one, and to furnish a very satisfactory test of what is essential, and what not, in election laws.” Const. Lim. 618. See, also, as to charter elections and returns, Heath, *In re*, 3 Hill (N. Y.), 42, 53; People v. Stevens, 5 Hill, 616; Morgan v. Quackenbush, 22 Barb. (N. Y.) 72. Courts will not enjoin municipal elections unless the power and right to do so plainly exist. Smith v. McCarthy, 56 Pa. St. 359; *post*, sec. 308, note. *The legislature may ratify the title to an office*, in which case it cannot be questioned *quo warranto*. People v. Flanagan, 66 N. Y. 237 (1876). *Acts of officers de facto*, *post*, secs. 221, note, 256, 276, 763, note, 892, note; compensation or salary of officers *de facto*. Samis v. King, 40 Conn. 298 (1873).

<sup>1</sup> People v. Matteson, 17 Ill. 167 (1855).

<sup>2</sup> People v. Loomis, 8 Wend. (N. Y.) 396 (1832); People v. Seaman, 5 Denio (N. Y.), 409; State v. Griffey, 5 Neb. 161 (1876). Where only *one vacancy* exists, votes given for *two persons jointly* are thrown away. Rex v. Mayor of Leeds, 7 Ad. & E. 963; and in this case it was held that a third candidate chosen by a single regular vote was elected; but as to votes being thrown away, see *supra*, sec. 196. Where, by an erroneous construction of the act, an election has been held for but one councillor, instead of two, the candidate second on the poll cannot have a *mandamus* to admit him to the office.

Regina v. Hoyle, H. L. 1855, cited in Rawl. on Corp. 65, note. His remedy is, by *mandamus*, to have a new election held for councillor, or (if the office be filled) by a *quo warranto*. *Ib.* The voting papers (corresponding in function to the American ballot, except that it is to be signed by the voter and openly voted) must distinguish between different classes of candidates; and hence where an election of four councillors had taken place on the 1st of November, three of whom were to supply ordinary vacancies, and one an extraordinary vacancy, but no distinction had been made between them in the notice of election, in the voting papers, or in publishing the names of the persons elected, the election was irregular and void. Regina v. Rowley, 3 Q. B. 143; s. c. in Exchequer Chamber, 6 Q. B. 668. See sec. 47, Municipal Corporations Act, and also 7 Will. IV. and 1 Vict. chap. lxxviii. sec. 11. Patterson, J., says: “There is no objection to the votes all being given on the same paper, if a proper distinction were made.” Regina v. Rowley, *supra*; and see Reg. v. Winchester, 7 Ad. & E. 215. By the English Municipal Corporations Act of 1835, sec. 32, the voting paper is required to contain “the *Christian* and surnames of the persons for whom the burgess votes, with their respective *places of abode*, such voting paper being previously *signed* with the *name* of the burgess voting and the name of the street in which the property for which he appears to be

§ 199 (138). **Effect of Illegal Votes being received.** — Receiving *illegal or improper votes* will not alone vitiate an election. It must be shown affirmatively, in order to overturn the declared result, that the wrongful action *changed* it. This rule applies to corporation elections as well as others.<sup>1</sup>

§ 200 (139). **Special Tribunal to decide Election Contests for Municipal Offices.** — *A constitutional provision that the judicial power of the State shall be vested in a supreme court and inferior courts, does not disable the legislature, in creating municipal corporations, from providing that the city council shall be the judge of the election of its mayor, members, and other officers, and from prohibiting the ordinary courts of justice from inquiring into the validity of the determination of the city council.*<sup>2</sup>

rated is situate." In construction of this section, it is held that the Christian name of the person voted for need not be written out in full; the contraction ordinarily used is sufficient. *Regina v. Bradley*, 3 E. & E. 634. But it seems that an initial letter only would not be sufficient. *Ib.* Though it would be in the signature of the voter. *Regina v. Avery*, 18 Q. B. 576; *Regina v. Tart*, 1 E. & E. 618. "Places of abode" held to mean places of residence, not of business. *Regina v. Hammond*, 17 Q. B. 772; *ante*, sec. 195; *Regina v. Deighton*, 5 Q. B. 896; *Dav. & M.* 682.

The Ballot Act of 1872, now embraced in the Municipal Corporations Act of 1882, prescribes the form of the ballot papers, and these are required to be furnished by the Mayor.

<sup>1</sup> *Murphy, In re*, 7 Cow. (N. Y.) 153 (1827); *People v. Cicotte*, 16 Mich. 283 (1868); *First Parish v. Stearnes*, 21 Pick. (Mass.) 148; *Judkins v. Hill*, 50 N. H. 140 (1870); *Johnston v. Charleston*, 1 Bay (S. C.), 441 (1795). In this last case the city council was specially authorized to judge of elections of corporation officers, and the court, respecting a contest before the council, said: "If the bad votes be deducted from the highest candidate, and he still has a majority, his election is good; but if, after such deduction, the next candidate has an equal or greater number of votes than the other, and it is doubtful which candidate had the greatest number

of valid votes, the council should send the matter back to the people." *Ante*, sec. 196, and note.

<sup>2</sup> *Mayor, &c. v. Morgan*, 7 Martin, La. (N. s.) 1; 9 *Ib.* (N. s.) 381 (1828); *infra*, secs. 202, note, 235, note, 244, 250, note. While the duty and power in the city council to adjudicate or decide cannot be delegated to a committee, it is competent for the council to appoint a committee to take testimony and to report the same and the facts to the council for its action thereon. *Salmon v. Haynes*, 50 N. J. L. 97 (1888). In *Wammacks v. Holloway*, 2 Ala. 81 (1841), a shrievalty contest, it was denied that it was within the constitutional power of the legislature to *deprive* a party claiming a public office of the right to a jury trial by making the summary or extra-judicial method conclusive. And to this effect was the opinion of two of the judges in *The People v. Cicotte*, 16 Mich. 283. Since elections to offices are not in the nature of contracts, there does not seem to be any substantial reason, in view of the plenary authority of the legislature over offices and officers, to doubt its power, in the absence of special constitutional restriction, to provide, prospectively, by a general act, the mode in which contests shall be determined. See *Govan v. Jackson*, 32 Ark. 553 (1877); *State v. Fitzgerald*, 44 Mo. 425 (1869); *Ewing v. Filley*, 43 Pa. St. 384; *Commonwealth v. Leech*, 44 Pa. St. 332; *Cooley, Const. Lim.* 276; *Ib.* 623, 624, note; *Smith v. New York*,

§ 201 (140). **Same subject.** — Where, by the charter, the *council are authorized to provide, by ordinance, a special tribunal* before which contested municipal elections shall be tried, and to provide the mode of procedure, it may pass such ordinance *after* an election has been held, and authorize it to determine contests arising out of a previous election. After such determination, *quo warranto* will lie against the party who was unsuccessful before the local tribunal, if he continue to claim and exercise the office.<sup>1</sup>

§ 202 (141). **Jurisdiction of the Courts of Law.** — *Common law courts of general and original jurisdiction* have the admitted power to inquire into the regularity of elections, corporate and others, by *quo warranto*, or an information in that nature, and, in certain cases, by *mandamus*. It is not unusual for charters to contain provisions to the effect that the *common council or governing body of the municipality "shall be the judge of the qualifications,"* or "*of the qualifications and election of its own members,*" and of those of the other officers of the corporation. What effect do such provisions have upon the jurisdiction of the superior courts? The answer must depend upon the language in which these provisions are couched, viewed in the light of the general laws of the State on the subjects of contested elections and *quo warranto*.<sup>2</sup> The principle is, that *the jurisdiction of the court remains* unless it appears with unequivocal certainty that the legislature intended to take it away. Language like that quoted above will not ordinarily have this effect, but will be construed to afford a cumulative or primary tribunal only, not an exclusive one. A provision that no court should take cognizance of

37 N. Y. 518; *People v. Mahaney*, 13 Mich. 481; *Steele v. Martin*, 6 Kan. 430; *State v. Lewis*, 51 Conn. 113; *Williamson v. Love*, 52 Tex. 335; *Seay v. Hunt*, 55 Tex. 545. If the charter provides that "the common council shall be the judge of the election and qualifications of its own members, and shall have the power to determine contested elections," its action under and pursuant to this power is final and not subject to review. *People v. Harshaw*, 60 Mich. 200.

When a city charter makes the *common council the final judges* of the election of aldermen, *mandamus* will not lie to compel them to reinstate one whom they had excluded without a proper hearing on the merits. *People v. Fitzgerald*, 41 Mich. 2; *Alter v. Simpson*, 46 Mich. 138. Where

the charter makes the council the judges of the election or qualification of its members, the *power expires with the council which admits the member*; the question cannot be opened by a subsequent council. *Doran v. De Long*, 48 Mich. 552; *infra*, sec. 204, note. *Quorum of council*, *post*, sec. 278 *et seq.*

<sup>1</sup> *State v. Johnson*, 17 Ark. 407 (1856), (mayorality contest). See *post*, chap. xxi., *quo warranto*.

<sup>2</sup> Text quoted and approved in *Kendall v. Camden*, 47 N. J. L. (18 Vroom) 64. The decision of a city council as to the *eligibility* of a member is not reviewable in a proceeding by *quo warranto*. *Seay v. Hunt*, 55 Tex. 545. See *ante*, secs. 200, 201; *post*, secs. 255, note, 892.

election cases by *quo warranto*, etc., would doubtless be sufficient to divest the jurisdiction of the judicial tribunals. And so, in general, of a provision that the council should have the *sole* or the *final* power of *deciding* elections.<sup>1</sup>

<sup>1</sup> Heath, *In re*, 3 Hill (N. Y.), 42, 52, and cases cited by Cowen, J., who is of opinion that no mere negative words, and that nothing less than *express words*, will oust the supervisory jurisdiction of the courts. *Infra*, secs. 204, note, 205, note. The amended charter of a city provided "that the board of councilmen shall be the *final* judges of the election returns, and of the validity of elections and qualifications of its own members." Park, J., says: "The statute in question was clearly intended to apply to cases of this kind. It makes the common council of the city final judges of the election returns and qualifications of its members. By the use of the word 'final' the legislature intended to divest the superior court of jurisdiction in such cases, and make the common council the sole tribunal to determine the legality of the election of its members." Sellick v. Common Council, &c., 40 Conn. 359 (1873); citing, *inter alia*, Commonwealth v. Baxter, 35 Pa. St. 263; Commonwealth v. Leech, 44 Pa. St. 332; Lamb v. Lynd, 44 Pa. St. 336; Commonwealth v. Meeser, 44 Pa. St. 341; People v. Witherell, 14 Mich. 48; O'Docherty v. Archer, 9 Tex. 295. In Linegar v. Rittenhouse, 94 Ill. 208, and Oregon v. McKennon, 8 Oreg. 485, the rule referred to in the text is cited and applied. In *California*, when the charter of a city provides that the common council "shall judge of the qualifications, elections, and returns of their own members," the council possesses the exclusive authority to pass on the subject, and the courts have no jurisdiction to inquire into the qualifications, elections, or returns of members of the council. People v. Metzker, 47 Cal. 524 (1874). See, in support of the text, Grier v. Shackelford, Const. Rep. 642; State v. Fitzgerald, 44 Mo. 425 (1869); Commonwealth v. McCloskey, 2 Rawle (Pa.), 369 (two judges dissenting); Strahl, *In re*, 16 Iowa, 369 (1864); State v. Funck, 17 Iowa, 365 (1864); Kane v. People, 4 Neb. 509 (1876); Bateman v. Megowan, 1 Met.

(Ky.) 533; Wammacks v. Holloway, 2 Ala. 81 (1841) (shrievalty contest); Hummer v. Hummer, 3 G. Greene (Iowa), 42; Macklot v. Davenport, 17 Iowa, 379; Gass v. State, 34 Ind. 424 (1870); State v. Marlow, 15 Ohio St. 114; distinguished, Kane v. People, 4 Neb. 509 (1876); *post*, chapters on *Quo Warranto*, *Mandamus*, and Remedies against Illegal Corporate Acts. Action of board of canvassers is not conclusive of the right of the party to an office, though it may deprive him, in the first instance, of a commission or certificate. *Quo warranto* lies notwithstanding the determination of the board of canvassers, on which full investigation may be had. State v. Governor, 1 Dutch. (N. J.) 331 (1856); State v. The Clerk, *Ib.* 354; People v. Kilduff, 15 Ill. 492; Cooley, Const. Lim. 623, and cases cited; Hadley v. Mayor, 33 N. Y. 603 (1865); Anthony v. Halderman, 7 Kan. 50 (1871).

Conformably to the views expressed in the text it has been decided by the Supreme Court of *Pennsylvania*, that the right given to city councils to be the judges of the qualification of their own members "in like manner as each branch of the legislature," does not preclude the jurisdiction of the courts to try the question of qualification by *quo warranto*, though the opinion of the profession seems to be otherwise, and it was otherwise held in the court below. Commonwealth v. Allen, 70 Pa. St. 465 (1872).

A special remedy given by statute is cumulative, and not exclusive of the ordinary jurisdiction of the courts, unless such be the manifest intention of the statute. Attorney-General v. Corporation of Poole, 4 Mylne & Cr. 17, overruling 2 Keen, 190; see, also, Attorney-General v. Aspinwall, 2 Mylne & Cr. 613. And hence a breach of a public trust by a municipal corporation is held, in England, to be cognizable in chancery, notwithstanding a special appeal be given in the particular matter to the lords of the treasury. *Ib.* Parr v. Attorney-General, 8 Cl. & F. 409; Attor-

§ 203 (142). **Same subject.** — Agreeably to the rule just stated, a clause in the charter of a municipal corporation, that the city council "shall be the judges of the election, returns, and qualifications of their own members, and of all other officers of the corporation," was held by the Supreme Court of Delaware *not to oust the Superior Court of the State* (invested with the usual powers of the King's Bench) of its *superintending jurisdiction over corporations*, and it was declared, if the council should erroneously decide that a person duly elected by the people to an office was not qualified to hold it, a *mandamus* might issue commanding them to admit him to the office.<sup>1</sup>

ney-General v. Corporation of Litchfield, 11 Beav. 120; see chapter on Remedies against Illegal Corporate Acts, *post*, sec. 910.

*Jurisdiction and powers of courts of chancery.* A court of chancery has no jurisdiction to enjoin the *holding of an election* by the people, and a writ issued for that purpose is void, and disobedience thereof will not subject a party to punishment as for a contempt of court. Darst v. People, 62 Ill. 306 (1872); Walton v. Develing, 61 Ill. 201 (1871). As to *jurisdiction of federal courts of equity* in respect of State or municipal offices, see *Re Sawyer*, 124 U. S. 200; *post*, secs. 205, 255, 275, 890, 906, note. *Courts of equity* have no inherent power to try *contested elections*, and have never exercised it except in cases where it has been conferred by express enactment or necessary implication therefrom. Dickey v. Reed, 78 Ill. 261 (1875). Where an election was held in a city on the question of whether the municipality should become incorporated under the general incorporation act for cities and villages, and a writ of injunction was issued out of the Circuit Court *enjoining the board of canvassers from canvassing the returns and declaring the result*, it was held that the Circuit Court, unaided by statute and exercising jurisdiction only according to the general usage and practice of courts of equity, had no power to issue the writ; that it was utterly void; that the canvassers were not bound to obey it, and could not be punished for contempt for refusing to do so. *Ib.* An injunction restraining a board of canvassers from proceeding to canvass and certify the result of an election until the further order of the judge granting the same, where the statute

requires the board to proceed by a certain day, is unauthorized. *State, ex rel. Bloxham v. State Board of Canvassers*, 13 Fla. 55 (1869). Equity will not interfere, by injunction, to restrain persons from *exercising the functions of public offices* on the ground of the want of binding force in the law under which their appointments were made, but will leave that question to be determined at law. Sheridan v. Colvin, 78 Ill. 237 (1875). In this case it was sought to enjoin the city council from enforcing an ordinance on the sole ground that, if the ordinance was enforced, it would deprive the complainants of the functions of offices which they held in the city; and it was held that a court of chancery had no jurisdiction. *Ib. Infra*, secs. 245, 255, 275, and note. Jurisdiction in equity over *contested county seat elections in Illinois*. Dickey v. Reed, 78 Ill. 261 (1875); Shaw v. Hill, 67 Ill. 455 (1873).

*The expenses of a municipal election* must be borne by the municipality, and not in whole, or in part, by the county; but to a bill by resident taxpayers to restrain the city from paying the election officers for their services, such officers are necessary parties. Bingham v. Camden, 29 N. J. Eq. (2 Stew.) 464 (1878); Butcher v. Camden, *Ib.* 478; *post*, sec. 911 *et seq.*

<sup>1</sup> *State v. Wilmington*, 3 Harring. (Del.) 294 (1840); *s. p.* *State v. Fitzgerald*, 44 Mo. 426 (1869). So in *Iowa*, where the city charter provided that the council should be "the judges of the election and qualifications of its own members," but no ordinance had been passed prescribing any method of trial, it was held that the *mere provision in the charter* did not preclude a contestant from a resort

§ 204 (143). **Same subject.** — Where the *legislative intent* is clear that the action of the council in contested election cases shall be final, the court will not inquire into election frauds, since the council is the judge of this matter as of others pertaining to the election; but the courts will inquire whether, in point of law, there was an office or vacancy to be filled.<sup>1</sup>

§ 205 (144). **Special Statutory Jurisdiction held to exclude Quo Warranto.** — Where, by statute, the returns of all municipal elections

to an information in the nature of a *quo warranto*. *State v. Funck* (mayoralty contest), 17 Iowa, 365 (1864). In a previous case the same court decided that under a charter making the council "judges of the election, returns, and qualifications of their own members," it was competent for the council to pass a general ordinance providing for the trial of contested elections of city officers, and making the council the tribunal for the trial of the same, such an ordinance being consistent with the general laws of the State, which, in providing special tribunals for contesting State, county, and township offices, omitted to make any special provision for contested elections to municipal offices. *Strahl, In re*, 16 Iowa, 369 (1864) (mayoralty contest). See sec. 202, note. *Re Sawyer*, 124 U. S. 200.

<sup>1</sup> *Commonwealth v. Leech*, 44 Pa. St. 332 (1863); *Commonwealth v. Meeser, Ib.* 341. Construction of words making the number of members of the council from a ward depend upon "the list of the taxable inhabitants." *Ib.*; *People v. Withereil*, 14 Mich. 48; *Tompert v. Lithgow*, 1 Bush (Ky.), 176 (1866).

Pending legal proceedings, the court, in favor of the officer apparently entitled, enjoined the adverse claimant from attempting to take possession of the office. *Ewing v. Thompson*, 43 Pa. St. 384 (1862); *Kerr v. Trego*, 47 Pa. St. 16, 292 (1864), noted, *infra*, sec. 275. *Ante*, sec. 202, note; *infra*, sec. 255, note. *Certificate of election* is the *prima facie* written title to office, and remains so until regularly set aside or annulled. *Ib.*; *post*, sec. 275; *People v. Thatcher*, 55 N. Y. 525 (1874).

The council, as board of canvassers, cannot investigate the *legality* of an election, but are concluded by the returns of the

judges; but the council, when sitting as a tribunal to judge of the election of members of their body, may go behind the returns and inquire into the fact as to who is elected. *State v. Rahway*, 33 N. J. L. 111 (1868). Under special charter the declaration and decision of the council as to who are elected, held essential to a complete election. *People v. North*, 72 N. Y. 124 (1878); *People v. Crissey*, 91 N. Y. 616. A charter provision making the board of aldermen the judge of the election, &c., of its own members, "subject, however, to the review of any court of competent jurisdiction," held not to oust the courts of jurisdiction or prevent them from entertaining original proceedings. *People v. Hall*, 80 N. Y. 117; *McVeany v. Mayor, &c. of New York*, 80 N. Y. 185, where the charter provided that the city council should "be the judges of the election and qualification of their own members," without indicating an intention to make their action final, it was held that the jurisdiction of the courts to try the question of such an election was not excluded. *State v. Gates*, 35 Minn. 385; *ante*, secs. 202, and note, 255, note. When a council, being by charter the sole judge of the election of its members, has investigated and seated a member, it cannot reopen the matter and order a second investigation. *Kendell v. Camden*, 47 N. J. L. (18 Vroom) 64; *supra*, sec. 200, note; *infra*, sec. 205, note. And where the charter provided for contesting elections before the judge of the Circuit Court, who was empowered "to pronounce judgment in the case according to the facts," it was held that his judgment was conclusive, and admissible in evidence in an action to recover the office. *Davidson v. Woodruff*, 68 Ala. 356.

were declared to be "subject to the inquiry and determination of the Court of Common Pleas upon the complaint of fifteen or more voters filed in said court within twenty days, and the court, in judging of such elections, was directed to proceed upon the merits thereof, and *determine finally* concerning the same according to the laws of the Commonwealth," this was held *to exclude the remedy by quo warranto* and all common-law remedies as to matters which might have been investigated in the special mode prescribed by the statute. The opinion was expressed that the judgment of the Common Pleas was final; that it could not be reversed by *quo warranto* or in any other collateral manner; and that even a *certiorari* would enable the appellate court to examine only the regularity of the proceedings of the Common Pleas, but not to examine the case on its merits as disclosed in the evidence.<sup>1</sup>

<sup>1</sup> *Commonwealth v. Garrigues*, 28 Pa. St. 9 (1857); *Commonwealth v. Baxter*, 35 Pa. St. 263; *Commonwealth v. Leech*, 44 Pa. St. 332; followed and approved, *State v. Marlow*, 15 Ohio St. 114; see *Ewing v. Filley*, 43 Pa. St. 386; *Lamb v. Lynd*, 44 Pa. St. 336. *Ellison, In re*, 20 Gratt. (Va.) 10, 29 (1870), commenting on *Commonwealth v. Garrigues*, *supra*. Function and powers of common council as election canvassers. *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 72. A city council, under authority "to canvass returns, and determine and declare the result" of elections to municipal offices, *exhausts its power when it has once legally canvassed the returns and declared the result*, and it cannot at a subsequent meeting make a re-canvass and reverse its prior determination. *Hadley v. Mayor*, 33 N. Y. 603 (1865), *supra*, sec. 204, note. The rule stated in the text (sec. 202), that the original or superintending jurisdiction of the superior courts should not be held to be taken away by any language which does not expressly, or by unequivocal implication, show this to have been the legislative intention, is a salutary one, but seems in some cases not to have been very strictly observed. In *Texas*, where the statute conferred upon the county court the power to determine contested elections of county officers, and gave no right to appeal, it was considered to be the policy of the statute to secure an early determination of such disputes, and it was

held that the judgment of the county court could not be revised either upon appeal or *certiorari*, and was final. *O'Docherty v. Archer*, 9 Tex. 295 (1852). The special mode provided by law for contesting elections must be followed. *Dickey v. Reed*, 78 Ill. 261 (1875); *post*, chap. xxii.

The Constitution of *Ohio* requires the General Assembly "to determine by law before what authority, and in what manner, the trial of contested elections shall be conducted;" and accordingly a specific mode of contesting elections in that State was provided by statute; and this mode was held *to exclude the common-law mode by proceedings in quo warranto*, and the result to bind the State as well as individuals. *State v. Marlow*, 15 Ohio St. 114 (1864).

In *South Carolina* it was held, where the legislature had authorized managers of elections "to hear and determine" cases of contested elections, without making any provision for an appeal, or any reference in the act to proceedings by *quo warranto*, that their decision was, without any express statutory declaration to that effect, final and conclusive, and that courts had no control over it. *Grier v. Shackelford*, 3 Brevard (S. C.), 491 (1814) (*Nott, J.*, dissenting); followed in *The State v. Delieesseline*, 1 McCord (S. C.), 52 (1821) (two judges dissenting). See *State v. Huggins*, Harper, Law, 94 (1824). But note remarks of *Evans, J.*, in *State v. Cockrell*, 2 Rich. Law (S. C.),



§ 206 (145). **Power to create and appoint Municipal Officers.** — At common law, municipal corporations *may appoint officers*, but only such as the nature of their constitution requires. The right of electing such officers as they are authorized to have is incidental to every corporation, and need not be expressly conferred by charter. The power of appointing officers is, at common law, to be exercised by the corporation at large, and not by any select body, unless it is so provided in the charter. The powers of corporate officers proper at common law are very limited, extending only to the administration of the by-laws and charter regulations of the corporation.<sup>1</sup>

§ 207 (146). **Power to create Offices.** — In this country the *charter or constitution of the corporation* usually provides with care as to all the *principal officers*, such as mayor, aldermen, marshal, clerk, treasurer, and the like, and prescribes their general duties. This leaves but little necessity or room for the exercise of any *implied power* to create other offices and appoint other officers.<sup>2</sup> It is

6, who, speaking of the subsequent act of 1839 (requiring the managers to hear and determine the validity of the election, and providing that their "decisions shall be final"), says: "I take it to be clear that the validity of an election, in all cases, must (under the act), in the first instance, be decided by the court of managers duly authorized according to law. All questions, whether of law or fact, must be submitted to this tribunal. Their decisions, on questions of *fact*, must necessarily be final, as no appeal is given; but I do not mean to say that their *errors of law* may not be corrected by *certiorari*, or such of the prerogative writs as may be best suited to the case." Accordingly, where an election within the act had not been contested before the managers, the court refused leave to file an information in the nature of a *quo warranto*. It was afterwards stated, by a distinguished judge in that State, that the scrutiny of municipal elections, as an incidental power, belongs in the first place to the city council; and if they abuse that power, the correction of that abuse devolves upon the courts by information in the nature of a *quo warranto*. *Per O'Neill, J.*, in *State v. Schnierle*, 5 Rich. Law (S. C.), 299, 301 (1852) (*quo war.* to test validity of defendant's election as mayor of Charleston). *s. p.* Johnston v. Charleston, 1

Bay (S. C.), 441 (1795). But the city council, in order to determine a contest for a municipal office, cannot swear the individual voters to compel them to declare for whom they voted. This is an inquisitorial power unknown to the principles of our government, and of dangerous tendency. *Ib.* See, also, *People v. Pease*, 27 N. Y. 81; *People v. Thacher*, 55 N. Y. 525 (1874); *People v. Cicotte*, 16 Mich. 283; *Cooley*, Const. Lim. 604-606. Election contests for office will not be determined on *habeas corpus* (*Strahl, In re*, 16 Iowa, 369), nor in general on *bill in equity*. *Hagner v. Heyberger*, 7 Watts & S. (Pa.) 104; but see *Kerr v. Trego*, 47 Pa. St. 292; *supra*, sec. 202, note; *post*, sec. 275; *Hughes v. Parker*, 20 N. H. 58; *Cochran v. McCleary*, 22 Iowa, 75 (1867); *Re Sawyer*, 124 U. S. 200, and chapter on Corporate Meetings, *post*, also chap. xxii. *post*. But as to county seat contest, where fraud is alleged, see *Boren v. Smith*, 47 Ill. 482.

<sup>1</sup> Willc. 234, pl. 598; *Ib.* 297, pl. 767; *Ib.* 298, pl. 769; *Glover*, 220; *Vintners v. Passey*, 1 Burr. 237; *Hastings' Case*, 1 Mod. 24; *Rex v. Barnard*, Comb. 416.

<sup>2</sup> Where it was manifest, from the whole tenor of a city charter, that it was the intention of the legislature itself to specify therein *all* the offices, and designate all the officers to be elected or chosen,

supposed, however, when not in contravention of the charter, that municipal corporations may, to a limited extent, have *as incidental to express powers the right to create certain minor offices of a ministerial or executive nature*. Thus, if power be conferred to provide for the health of the inhabitants, this would give the corporation the right to pass ordinances to secure this end, and the execution of such ordinances might be committed to a health officer, although no such officer be specifically named in the organic act, if this course would not conflict with any of its provisions. But the power to create offices even of this character would be limited to such as the nature of the duties devolved by charter or statute on the corporation naturally and reasonably required. The *provisions of the charter as to time and mode of election, the appointment, qualifications, and duration of the terms of officers, must be strictly observed*.<sup>1</sup> Therefore,

and to regulate the mode of appointment, it was held that the city council could not, by virtue of an *inherent or implied power, create another officer, fix his term, provide for his appointment, and clothe him with the powers of a municipal officer*. *Hoboken v. Harrison*, 1 Vroom (30 N. J. L.), 73 (1862). It is said, in the opinion, that the power to create municipal officers should be *expressly* conferred. In *New Jersey, pound-keepers*, from a very early period, had been public township officers, elected in the same way as other officers of the township. Under these circumstances it was held that a municipal corporation other than, but situate within the township, could not, without *express* authority therefor, establish another public pound within the limits of the township, and prescribe regulations and fees variant from those prescribed by the general law; and it was further held, that the office of pound-keeper could not be considered as one essential to the business of the corporation; nor is a pound-keeper one of those subordinate officers which all municipal corporations may, as of course, appoint. It was, however, admitted by the court that where such a corporation has power to do an act, it has the incidental power to appoint persons to carry it into effect. *White v. Tallman*, 2 Dutch. (N. J.) 67 (1856). *Infra*, sec. 210, note. Construction of power to appoint *weigh-master*. *Hoffman v. Jersey City*, 5 Vroom (34 N. J. L.), 172. Power to appoint when office

is vacated "by death or disability," held to authorize appointment where a vacancy is caused by *resignation*. *State v. Newark*, 3 Dutch. (N. J.) 185. Authority to a municipal corporation to *appoint an officer was inferred* from the frequent mention of the office and its duties in the charter. *People v. Bedell*, 2 Hill (N. Y.), 196; see, also, *Field v. Girard College*, 54 Pa. St. 233. Legislative prohibition to common council against *creating new offices* extends to *clerks*, but not to janitors and ordinary servants. *Costello v. Mayor, &c. of N. Y.*, 63 N. Y. 48 (1875); *Sullivan v. Mayor, &c. of N. Y.*, 53 N. Y. 652. Power to appoint *marshal* under charter of East St. Louis. See *People v. Canty*, 55 Ill. 33. A *police judge* is held to be a municipal officer in *California*. *People v. Henry*, 62 Cal. 557. Police officers and power to appoint. *Infra*, sec. 210, and note. Where an appointment is to be made by a city council, *if a quorum be present*, a person who receives a majority of the votes cast will be elected although a majority of the council may abstain from voting. *Launtz v. People*, 113 Ill. 137; *post*, sec. 278 *et seq.*

<sup>1</sup> Quoted with approval in *Trowbridge v. Newark*, 46 N. J. L. (17 Vroom) 140, where, by charter, the appointment of a prosecuting attorney was committed to a common council, but there was no direction as to the *mode of appointment*, held, by a divided court, that having chosen one person by ballot

an ordinance which makes eligible those who, by the charter, are not so,<sup>1</sup> or which abridges the term of officers, as fixed by the charter, is unauthorized and void.<sup>2</sup> Where provisions for the election of municipal officers are made by ordinance in pursuance of charter powers, they must also be strictly observed.<sup>3</sup>

§ 208 (147). **The Mayor.** — Every municipal corporation is provided with an *executive head*, usually styled the *mayor*. In the chapter on Corporate Meetings we will point out the difference, in some respects, between the mayor of an old corporation in England and the officer known by that name in this country.<sup>4</sup> In both countries the mayor is the head officer or executive magistrate of the corporation; but with us it is important to bear in mind that all his powers and duties depend entirely upon the provisions of the charter or constituent act of the corporation, and valid by-laws passed in pursuance thereof, and these vary, of course, in different municipalities. It is usually made his duty, however, to see that municipal ordinances are executed, and to preside at corporate meetings; and he is frequently expressly declared to be a member of the council or local legislative body. Properly and primarily his duties are executive and administrative, and not judicial or legislative. But judicial duties are often superadded to those which properly

the council had *exhausted its power*, and that a subsequent resolution declaring another person to be elected was of no effect. *State, ex rel. v. Barbour*, 53 Conn. 76.

<sup>1</sup> *Rex v. Mayor of Weymouth*, 7 Mod. 373; *Rex v. Bumstead*, 2 B. & Ad. 699; *Rex v. Spencer*, 3 Burr. 1827; *Rex v. Chitty*, 5 Ad. & E. 609. *Ante*, sec. 195. A city council cannot elect its own members when the law provides that they shall be elected by ballot by the electors of the city. *Kearney v. Andrews*, 2 Stockt. (N. J.) 70. Majority of council essential to valid appointment of city treasurer. *State v. Patterson*, 6 Vroom (35 N. J. L.), 190. See *Douglass v. Essex*, 9 Vroom (38 N. J. L.), 214; *State v. Jersey City*, 2 Dutch. (N. J.) 444, 447. The appointment of a person to a city office by a mayor under a law which requires confirmation by the council gives the appointee no right to the office without such confirmation by the proper and legal city council. *People v. Weber*, 89 Ill. 347.

<sup>2</sup> *Stadler v. Detroit*, 13 Mich. 346

(1865); *Vason v. Augusta*, 38 Ga. 542 (1868). Chapter on Ordinances, *post*. The office of *treasurer* of a municipal corporation is not a "civil office" within the meaning of the provision of the Constitution excluding the clergy from "holding any civil office in this State, or from being members of the legislature." *State v. Wilmington*, 3 Harring. (Del.) 294 (1840); see *Commonwealth v. Dallas*, 3 Yeates (Pa.), 300. "*Lucrative offices*," in the constitutional sense, defined to embrace county recorder, commissioner, township trustee, and supervisor. *Daily v. State*, 8 Blackf. 329; *Creighton v. Piper*, 14 Ind. 182; *Howard v. Shoemaker*, 35 Ind. 111. The office of city councilman is not "lucrative" within the prohibition of the State Constitution against the same person holding more than one lucrative office at the same time. *State v. Kirk*, 44 Ind. 401 (1873); s. c. 15 Am. Rep. 239. As to office of *city clerk*, *Mohan v. Jackson*, 52 Ind. 599 (1876).

<sup>3</sup> *Saunders v. Lawrence*, 141 Mass. 380.

<sup>4</sup> *Post*, sec. 270 *et seq.*

appertain to the office of mayor, and he is invested by legislative enactment with the authority to administer not only the ordinances of the corporation, but also judicially to administer the laws of the State.<sup>1</sup>

§ 209 (148). **Same subject.** — The *office of mayor* has long existed in England,<sup>2</sup> and many of its general features have been adopted in

<sup>1</sup> Waldo v. Wallace, 12 Ind. 569 (1859), and growing out of it, see, also, Gulick v. New, 14 Ind. 93 (1860); Howard v. Shoemaker, 35 Ind. 111 (1871); Reynolds v. Baldwin, 1 La. An. 162 (1846); Muscatine v. Steck, 7 Iowa, 505; 2 Iowa, 220; Strahl, *In re*, 16 Iowa, 369; Shafer v. Mumma, 17 Md. 331; Luehrman v. Taxing District, 2 Lea (Tenn.), 425. Approving text. Slater v. Wood, 9 Bosw. (N. Y.) 15; *ante*, chap. iii. Morrison v. McDonald, 21 Me. 550 (1842); State v. Maynard, 14 Ill. 419; Commonwealth v. Dallas, 3 Yeates (Pa.), 300 (1801); State v. Wilmington, 3 Harring. (Del.) 294 (1839); Prell v. McDonald, 7 Kan. 426 (1871). This section of the text cited and followed. Martindale v. Palmer, 52 Ind. 411 (1876).

Power of mayor, in his official name, to bring *suit* to prevent or restrain violations of law by other municipal officers, declared. Genois, Mayor, &c. v. Lockett, 13 La. 545 (1838). But *quære*. The mayor of a city has no *incidental power* to execute an *appeal bond* for the corporation; and such a bond was regarded as not even incidental to the power of taking an appeal, but must be authorized by the council. Baltimore v. Railroad Co., 21 Md. 50 (1863). A precept to collect a street assessment, signed by a member of the council acting temporarily as president thereof, is void, when the statute requires the *signature* of the mayor. Jeffersonville v. Patterson, 32 Ind. 140 (1869). Injunction will lie to restrain a sale on such a precept. *Ib.* See chapter on Remedies against Illegal Corporate Acts, *post*.

As to nature and extent of authority of mayors and other civil officers to employ force for the prevention or suppression of mobs, riots, &c., see Ela v. Smith, 5 Gray (Mass.), 121 (1855), arising out of the arrest of Anthony Burns as a fugitive slave. Power of mayor to order *demoli-*

*tion of works and buildings in public places.* Henderson v. Mayor, 3 La. 563. Mayor may sanction an ordinance passed by a common council, whose term has expired. Elmendorf v. Ewen, 2 N. Y. Leg. Obs. 85. *Notice to mayor.* Nichols v. Boston, 98 Mass. 39. *Police and executive power of mayor.* Shafer v. Mumma, 17 Md. 331; Slater v. Wood, 9 Bosw. (N. Y.) 15; Pedrick v. Bailey, 12 Gray (Mass.), 161; Nichols v. Boston, 98 Mass. 39. *Alderman acting as mayor.* State v. Buffalo, 2 Hill (N. Y.), 434. *Judicial power of mayor.* See Municipal Courts, *post*; Prell v. McDonald, 7 Kan. 426; Howard v. Shoemaker, 35 Ind. 111 (1871). Presence and functions of mayor at meetings of the council. See chapter on Corporate Meetings, *post*.

*Liability of mayor* in Upper Canada to private actions in respect to his official acts. Fair v. Moore, 3 Up. Can. C. P. 484; Moran v. Palmer, 13 Up. Can. C. P. 450, 528. *Fraud of mayor* restrained and relieved against. Patterson v. Bowes, 4 Grant, 170; *Ib.* 489; *post*, sec. 910, note.

<sup>2</sup> *History and nature of office of mayor.* Consult 4 Jacob's Law Dict. 264, 265; 2 Toml. Law Dict. 540; 2 Bouv. 150; Spelm. Gloss. "Mayor"; Ela v. Smith, 5 Gray (Mass.), 121 (1855); Achley's Case, 4 Abb. Pr. Rep. 35 (1856); Cochran v. McCleary, 22 Iowa, 75, 82 (1867); Nichols v. Boston, 98 Mass. 39; Fletcher v. Lowell, 15 Gray (Mass.), 103; *ante*, secs. 13, 174; *post*, secs. 253, 260, 271, 331, 428. The office in England is quite ancient. In 1204 King John made the bailiff of King's Lynn a mayor, with administrative powers. The title was a common one as early as the time of Bracton.

Mr. Norton, in his valuable "Commentaries on the History, Constitution, and Chartered Franchises of the City of London," says, that the first *special grant* of the *mayoralty* to the city of London

this country. In a former page, suggestions have been made in favor of increasing the powers, dignity, and responsibility of this office as a means of ensuring, under existing conditions in this country, more satisfactory municipal rule; but the subject is not sufficiently connected with practical law to warrant a more extended reference to it in a work of this character.<sup>1</sup>

### § 210 (149). Police Officers; Power to make Arrests upon View.

—The office of a *police officer* is not known to the common law; it is created by statute, and such an officer has, and can exercise, only such powers as he is authorized to do by the legislature, expressly or derivatively.<sup>2</sup> He is an officer of the *State* rather than of the

was made by King John in a charter dated on the ninth day of May, in the sixteenth year of his reign, A. D. 1215. This charter declares that the king has granted and confirmed to the barons of London the right of choosing a mayor every year, and at the end of the year of removing him and substituting another, if they will, or electing the same again. He is to be presented to the king, and swear to be faithful to him. The use of the word *confirmed*, in this charter, shows that the name and officer existed before. The first civic magistrate had begun to be called by the name of mayor toward the end of the reign of King Richard. The denomination of *mayor*, it is said on the authority of legal antiquaries, can be traced to a very far date among the German and French nations of Europe. The chief governor of the town communities which arose in France in the eleventh century was often styled the mayor. It is a matter of history that in France, the *mayor of the palace* was the governor of Paris, often holding sovereign power, and, indeed, in time usurping it, since it was from one of the mayors of the palace that the family of Charlemagne descended. And it is suggested by Mr. Norton that the term "mayor," familiar to the Normans, may have been originally, though remotely, derived from the same source. Norton's Com., pp. 90, 402, 403; see, also, Pulling's Laws, Customs, &c., of London, chap. ii. 16 m. The powers and duties of *mayor* are prescribed with particularity in the Municipal Corporations Act of 1882, secs. 15, 16, 53, 60, 61, 66, 67, 68, 148,

244, and elsewhere. He is *ex officio* "a justice for the borough," sec. 155. Mr. Shaw in describing the workings of the municipal system of Great Britain points out the great difference between the functions and duties of an English and American mayor. Pol. Science Quarterly, Vol. IV. p. 209, June, 1889.

<sup>1</sup> *Ante*, chap. i. sec. 13, and notes.

<sup>2</sup> *Commonwealth v. Dugan*, 12 Met. (Mass.) 233 (1847); *Commonwealth v. Hastings*, 9 Met. (Mass.) 259; *ante*, secs. 58, 60. Where a *policeman* is duly appointed under charter authority to organize and regulate a city watch and the general police of the city, the presumption is that he possesses the powers of ordinary peace officers at common law. *Doering v. State*, 49 Ind. 56 (1874). In *Massachusetts* policemen are peace officers, and a person who assaults or obstructs them in the discharge of their duties is indictable, though they have not been sworn, the statute not requiring this. *Buttrick v. Lowell*, 1 Allen (Mass.), 172; *Mitchell v. Rockland*, 52 Me. 118, 122. In *The People v. Metropolitan Police Board*, 19 N. Y. 188 (1859), growing out of the act to establish a *Metropolitan Police District*, it was decided by a majority of the Court of Appeals that, although the office was a new one, yet the mode of filling it not being provided by the Constitution, it was in the power of the legislature to confer it upon persons discharging substantially the same duties within a more limited territorial jurisdiction, and to dispense with an oath of office. See, also, *People v. Draper*, 15 N. Y. 532 (1857),

municipality in which he exercises his office.<sup>1</sup> Where police officers are, by statute, invested with all the powers of constables, as conservators of the peace, this gives them authority to *arrest upon view* intoxicated persons while guilty of disorderly conduct, or other persons violating the laws, and to detain them until they can be brought before a magistrate.<sup>2</sup> If such an officer releases an intoxi-

where the Court of Appeals held the "Act to establish a Metropolitan Police District" valid; approved, Metropolitan Board of Health v. Heister, 37 N. Y. 661 (1868); McDermott v. Metropolitan Police Board, 5 Abb. Pr. 422; Police Commissioners v. Louisville, 3 Bush (Ky.), 597 (1868); *ante*, sec. 58, and notes. See People v. Albertson, 55 N. Y. 50 (1873), where People v. Draper, *supra*, is limited, questioned, and distinguished. *Extent of legislative power* and control over appointment, powers, &c. of police, health, and other local officers. Baltimore v. Board of Police (Baltimore Police Act), 15 Md. 376 (1859); Metropolitan Board of Health v. Heister, 37 N. Y. 661 (1868); People v. Hurlbut, 24 Mich. 44 (1871); Police Comm'rs v. Louisville, *above cited*; *ante*, sec. 58, note. *Mode of compensation*. Worcester v. Walker, 9 Gray (Mass.), 78. Under authority to make rules necessary to good order and public peace, the *power to appoint* policemen is implied. State v. Sims, 16 S. C. 486; *ante*, sec. 207.

<sup>1</sup> Burch v. Hardwicke, 30 Gratt. 24. While a mayor under the Constitution may remove officers of a municipality, he cannot remove a State officer though elected or appointed by the people of the municipality and paid by them; if the mayor removes him from office he exceeds his authority and is responsible to the officer in a civil action for damages. *Ib.* A police judge held to be a municipal officer. People v. Henry, 62 Cal. 557. A policeman of a city is a public officer, holding his office as a trust from the State, and not as a matter of contract between himself and the city. Farrell v. Bridgeport, 45 Conn. 191.

<sup>2</sup> Taylor v. Strong, 3 Wend. (N. Y.) 384 (1829); Bacon, Ab. Constable, C.; Commonwealth v. Hastings, 9 Met. (Mass.) 259 (1843); Prell v. McDonald, 7 Kan. 426 (1871). As to power of constables in such

cases, see 1 Hale P. C. 587; Hawkins P. C. Book II. chap. xiii. sec. 8.

*Authority to arrest upon view, and without warrant.* Where such a course is not repugnant to the general law of the State, the proper officers of a municipal corporation may be authorized to *arrest without warrant*, or upon view, offenders who violate ordinances in the presence of such officers. Bryan v. Bates, 15 Ill. 87 (1853); Main v. McCarty, 15 Ill. 442; State v. Lafferty, 5 Harring. (Del.) 491; State v. Sims, 16 S. C. 486, *post*, sec. 414, note. If an offence is committed in view of the officer, he may arrest immediately, or as soon thereafter as he can. Boaz v. Tate, 43 Ind. 60 (1873). See chapter on Municipal Courts, *post*.

Power to a city corporation to make ordinances for the security, or good order, or government of the place, and to appoint or elect officers to carry out ordinances, authorizes the appointment of city guards, or police officers, or peace officers; and such officers may arrest, without a warrant, persons engaged in breaches of the peace. City Council v. Payne, 2 Nott & McCord (S. C.), 475 (1820). A city council may authorize *arrests upon view*, without warrant, for violation of its by-laws, when not inconsistent with the general statutes or policy of the State (White v. Kent, 11 Ohio St. 550 (1860); Thomas v. Ashland, 12 Ohio St. 127), but not otherwise. Thus, where the city charter declared all by-laws inconsistent with the general law to be void, and where the general law did not allow an officer to arrest for a misdemeanor not committed in his presence, without a warrant, it was held that an ordinance authorizing police officers to make arrests, without a warrant, for violation of ordinances not committed in their presence, was void, and would not protect the officer against a suit for trespass. Pesterfield v. Vickers, 3 Coldw.

cated person, whom he had arrested while conducting himself in a disorderly manner, upon his promise to go directly home, he may lawfully retake him, on his going into a bar-room before he is out of the officer's sight; and such arrest is justified, whether it be regarded as a recaption for the original purpose, or as a new arrest for disorderly conduct still continuing.<sup>1</sup>

§ 211 (150). **The Subject illustrated.** — Charters authorizing municipal officers to make *arrests upon view* and *without process*, are to be viewed in connection with the general statutes of the State,<sup>2</sup> and being in derogation of liberty, are strictly construed; hence an officer making such an arrest, though on the Sabbath day, should, instead of imprisoning, take without unreasonable delay the person arrested before the proper tribunal and prefer a complaint against him, as provided by the statutes of the State.<sup>3</sup>

(Tenn.) 205 (1866). *Further as to arrests, on view*, without information, and the duty of the officer, see *Doering v. State*, 49 Ind. 56 (1874); *Johnson v. Americus*, 46 Ga. 80 (1872); *Nealis v. Hayward*, 48 Ind. 19 (1874); *Boaz v. Tate*, 43 Ind. 60 (1873); *Smith v. Donnelly*, 66 Ill. 464 (1873); *Scirelle v. Nevis*, 47 Ind. 289 (1874); *Galliard v. Laxton*, 2 B. & S. 363; *Codd v. Cabe*, L. R. 1 Ex. Div. 352; s. c. 13 Cox, 202; *Regina v. Chapman*, 12 Cox, 4. If a private individual state facts to an officer, who thereupon, on his own responsibility, arrests a person, or if a private person procure a magistrate to issue a warrant for taking a person, the imprisonment is not his act, and he may show this under the plea of not guilty. *Barber v. Rollinson*, 1 C. & M. 330; *Stonehouse v. Elliott*, 6 T. R. 315; *Brandt v. Craddock*, 27 L. J. Ex. 314; *Grinham v. Willey*, 4 H. & N. 496. An officer is justified in arresting without a warrant upon a *reasonable suspicion of a felony* having been committed, and of the person being guilty of it, although no felony has in fact been committed, and whether the reasonable grounds for suspicion are matters within his own knowledge or facts stated to him by another. *Lawrence v. Hedger*, 3 Taunt. 14; *Davis v. Russell*, 5 Bing. 355; *Beckwith v. Philby*, 6 B. & C. 635; *Hogg v. Ward*, 3 H. & N. 417. But an officer is not in general justified in arresting a person who frequents a high-

way with intent to commit a felony (*Timson, In re*, L. R. 5 Ex. 257; see, also, *Jones, In re*, 7 Ex. 586), or in arresting a person for a *misdeemeanor* without a warrant (*Mathews v. Biddulph*, 3 M. & G. 390; *Griffin v. Coleman*, 4 H. & N. 265); unless there be a breach of the peace in his presence (*Timothy v. Simpson*, 1 C. M. & R. 757; *Derecourt v. Corbishley*, 5 El. & B. 188), or danger of a renewal of it. *The Queen v. Light*, 27 L. J. Mag. Cas. 1; *The Queen v. Walker*, 23 L. J. Mag. Cas. 123; *Pesterfield v. Vickers*, 3 Coldw. (Tenn.) 205. It would seem that a constable having a warrant to arrest is not bound to accept a tender of the fine and costs. See *Arnott v. Bradley*, 23 Upper Can. C. P. 1. Although police officers may arrest without warrant for crimes, it does not follow that they have the power to do so in the case of lesser offences. *Galliard v. Laxton*, 2 B. & S. 361; *Regina v. Chapman*, 12 Cox, 4; *Codd v. Cabe*, 13 Cox, 202; s. c. L. R. 1 Ex. Div. 352.

<sup>1</sup> *Commonwealth v. Hastings*, *supra*. It follows that an obstruction offered by a third person to the officer in making such an arrest would be unjustifiable. *Ib.*

<sup>2</sup> *Supra*, sec. 210, note.

<sup>3</sup> *Low v. Evans*, 16 Ind. 486 (1868), (action for false imprisonment); *Pow v. Becker*, 3 Ind. 475 (1852); *Vandever v. Mattock*, 3 Ind. 479. The *delay* in taking the person arrested before a magistrate must

§ 212 (151). **Mode of Election; Power over its own Officers.**

— A city council authorized to *elect* certain officers, may, where no mode of election is prescribed, appoint them by *resolution*, and is not bound to elect them by ballot;<sup>1</sup> and the corporation has full control, unless specially restricted, over all offices and officers existing only under by-laws.<sup>2</sup> A vote of an authorized committee of a city, electing their clerk to be the city engineer for a year from a subsequent day, duly recorded, and signed by him as their clerk, is sufficient to take his appointment out of the statute of frauds.<sup>3</sup>

§ 213 (152). **Presumption of due Appointment.** — The same presumptions which are applicable to acts of individuals are, in general, applicable to acts of corporations. Thus, if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a *regular appointment will be presumed*, and his acts will bind the corporation, although no written proof is or can be adduced of his appointment.<sup>4</sup>

not be unreasonable. *Johnson v. Americus*, 46 Ga. 80 (1872). In *Low v. Evans*, it was held that there was no authority in the officer making the arrest to imprison the party arrested for an indefinite time (*e. g.*, from Sunday until the next day) because he might be subject to a penalty, to be recovered in a suit in the nature of an action of debt. If the court is not in session the officer may confine the person arrested until he can be brought before the court, which should be done at the earliest period. *Boaz v. Tate*, 43 Ind. 60 (1873); *State v. Freeman*, 86 N. C. 683. An intoxicated person, arrested late at night, may be detained until the next day before being taken to the court. *Scircle v. Nevis*, 47 Ind. 289 (1874).

<sup>1</sup> *Low v. Comm'rs of Pilotage, R. M. Charl.* (Ga.) 302 (1830), *per Law, J.*; *ante*, sec. 94. Power of council to appoint, and when it may delegate this power to a committee. *People v. Bedell*, 2 Hill (N. Y.), 196; *Commonwealth v. Pittsburgh* (police force), 14 Pa. St. 177 (1850); *Wilder v. Chicago*, 26 Ill. 182; *Russell v. Chicago* (collectors), 22 Ill. 285; *Trowbridge v. Newark*, 46 N. J. L. (17 Vroom) 140; *ante*, sec. 96.

<sup>2</sup> As to plenary power and control, when not restricted, of a municipal corporation over offices and officers existing only under ordinances, see *People v. Con-*

*over*, 17 N. Y. 64 (1858); *Waldraven v. Memphis* (right to abolish office), 4 Coldw. (Tenn.) 431 (1867); *infra*, sec. 231; *Madison v. Korbly*, 32 Ind. 74, 79 (1869); *Samis v. King*, 40 Conn. 298 (1873). The power to appoint implies, in general, the power to remove the appointees. *People v. Hill*, 7 Cal. 97. Thus a municipal corporation appointing commissioners in cases of local improvements, may remove them. *People v. Mayor, &c. of New York*, 5 Barb. (N. Y.) 43 (1848). *Post*, sec. 238 *et seq.* But in *South Carolina*, see *Caulfield v. State*, 1 S. C. 461 (1869), the exercise of the power to appoint to office is an executive, not a legislative act. *Achley's Case*, 4 Abb. Pr. 35 (1856). Power to suspend officer. *Post*, sec. 247, note. A provision that the city council "may" by ordinance provide for the election, by the qualified voters, of any of the officers named in the act, held to leave it to the discretion of the city council whether the office of city attorney should be elective or not. *Ball v. Fagg*, 67 Mo. 481.

<sup>3</sup> *Chase v. Lowell*, 7 Gray (Mass.), 33 (1856).

<sup>4</sup> *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 70, where Mr. Justice Story cites many cases, establishing the principle "that the acts of artificial persons afford the same presumptions as



§ 214 (153). **Oath and Official Bond.** — Public officers are usually required to *take an oath of office*, and those entrusted with money or property are also generally required to *give bond and sureties* for the faithful performance of their duties. In England it is said that an oath of office cannot be required to be taken by a by-law when none is required by the charter.<sup>1</sup> But in this country the *oath of office* is, in substance, only that the officer will support the Constitution and faithfully perform his official duties. And such an oath may, doubtless, be required by ordinance, to be taken by every municipal officer before entering upon his office. Statutes requiring an oath of office and bond are usually directory in their nature; and unless the failure to take the oath or give the bond by the time prescribed is expressly declared, *ipso facto*, to vacate the office, the oath may be taken or the bond given afterwards, if no vacancy has been declared.<sup>2</sup>

the acts of natural persons." *Infra*, sec. 237, note and cases. The doctrine that not only the appointment, but the authority of an agent of a corporation may be implied from the adoption or recognition of his acts (Angell & Ames Corp. sec. 284), was applied in *Killey v. Forsee*, 57 Mo. 390 (1874), to municipal corporations; and it was held that the failure of a deputy city engineer to file a certificate of his appointment, as provided by the charter, did not vitiate his acts.

<sup>1</sup> *Rex v. Dean, &c.*, 1 Str. 539; *Glover*, 305; *Willc.* 133; *Grant*, 76. It is the settled doctrine of the Supreme Court that the *United States*, being a body politic, with a capacity to enter into contracts, may within the sphere and in the execution of its appropriate powers, *take bonds and securities*, which are not prohibited by law, though such bonds and securities may not have been prescribed by any pre-existing legislative act. These, though voluntary, — that is, not extorted or coerced, — if taken for a lawful purpose and upon a good consideration, are valid. *United States v. Tingey*, 5 Pet. (U. S.) 114, 128 (1831); approved, *Same v. Linn*, 15 Pet. (U. S.) 290 (1841); and see *Dugan v. United States*, 3 Wheat. (U. S.) 172; *United States v. Bradley*, 10 Pet. (U. S.) 343. *Infra*, sec. 216. Right of *city to require* bond of indemnity from the owner, who proposes to excavate sidewalk to make cellars, vaults, or improvements. *Mc-*

*Carthy v. Chicago*, 53 Ill. 38 (1870). A prospective appointment to public office, made by a body which, as then constituted, is empowered to fill the vacancy when it arises, was held to be legal in the absence of any express statutory provision to the contrary, and to vest title to the office in the appointee. *State v. Van Buskirk*, 40 N. J. L. 463. The power of appointment to office, when executed by the performance of the last act made necessary in its execution, *is not revocable* without the consent of the appointee. *Ib.* In England the oath of allegiance and the judicial oath are imperative. The Mayor is required also to take an oath as Mayor. *Munic. Corp. Act 1882*, sec. 15; 31 and 32 Vict. chap. 72.

<sup>2</sup> *Smith v. Cronkhite*, 8 Ind. 134; *State v. Findley*, 10 Ohio, 51, 59, and cases cited; *State v. Porter* (failure to give bond by city marshal in time), 7 Ind. 204; *Sprowl v. Laurence*, 33 Ala. 674; *Bank v. Dandridge*, 12 Wheat. 64; *United States v. Le Baron*, 19 How. 73; s. c. 4 Wall. 642; *Marbury v. Madison*, 1 Cranch, 137; *Launtz v. People*, 113 Ill. 137; *Cawley v. People* (county treasurer's bond), 95 Ill. 249 (1880); *Chicago v. Gage* (city treasurer's bond), 95 Ill. 593 (1880); *Caskey v. Greensborough*, 78 Ind. 233; *St. Helena v. Burton*, 35 La. An. 521. It is no defence to an action upon an official bond that the oath required by law was not taken within the prescribed time.

§ 215 (154). **Oath when a Condition Precedent; Acts of de facto Officer.** — When the statute requires a prescribed oath of office *before* any person elected "*shall act therein*," a person cannot justify as such officer *unless he has taken an oath* in substantial, not necessarily literal, compliance with the law. Third parties, however, acting in good faith with him as such officer, are protected, notwithstanding his failure to take the requisite oath.<sup>1</sup>

*Ib.* Charter provision that oaths of office be taken and subscribed *within ten days* is *directory*, and may be complied with after that time. *Kearney v. Andrews*, 2 Stockt. (N. J.), 70. In *New York* it is held that a town collector elect, in order to qualify for the office, is required by the Constitution to take and subscribe an oath of office, and until he has thus qualified, the incumbent may hold over. *People v. McKinney*, 52 N. Y. 374 (1873). But as no time is limited for taking such oath it may be taken before the office is forfeited by the neglect to execute the required bond. *Ib.* A town may lawfully require a collector of taxes or other officer to *furnish sureties* for the faithful discharge of the duties of his office. This power is incidental, and need not be express. If the person chosen neglects, or is unable, to furnish sureties, this amounts to a non-acceptance of the trust, although he has taken the oath of office. *Morrell v. Sylvester*, 1 Greenl. (Me.) 248. While it is the duty of an officer to perfect his title to his office by complying with the *directions* of the law as to taking oath, depositing bonds, &c., yet his failure to do so is his own wrongful neglect, and is no defence to his sureties in an action on his official bond. *State v. Toomer*, 7 Rich. (S. C.) Law, 216 (1854); *State v. Findley*, 10 Ohio, 51 (1840). The giving of a bond and having it approved were held in the case in judgment to be *conditions precedent* to the right of occupying a municipal office. *Howell v. Commonwealth*, 97 Pa. St. 332; *post*, sec. 235, note. Rule in *Virginia*, see *infra*, sec. 220, note.

A city council, whose duty it is to *decide upon the sufficiency of the sureties of a city officer*, cannot refuse to do so or postpone its decision because the title to the office is elsewhere disputed; and a *mandamus* will lie to compel it to act upon the sufficiency of the securities offered. *Com-*

*monwealth v. City Council of Philadelphia*, 7 Am. Law Reg. (N. S.) 362. Effect of signing *official bonds in blank*, see *Chicago v. Gage* (bond of city treasurer), 95 Ill. 593 (1880). Mr. Justice *Sheldon* cites and reviews many of the cases on this subject. *Butler v. United States*, 21 Wall. 272; *Dair v. United States*, 16 Wall. 1. *Murfree on Official Bonds*, sec. 20 *et seq.*, sec. 42, and cases.

<sup>1</sup> *Olney v. Pearce*, 1 R. I. 292 (1850), and authorities cited by Mr. Angell in note; *Riddle v. Bedford County*, 7 Serg. & Rawle (Pa.), 392; *Neale v. Overseers*, 5 Watts (Pa.), 538. Where an officer, before acting, is required to qualify by taking an oath of office, *he has no legal right, until he qualifies*, to recover fees of an incumbent received after the plaintiff's appointment or election, and before he qualifies. *Thompson v. Nicholson*, 12 Rob. (La.) 326 (1845). See *City v. Given*, 60 Pa. St. 136; *supra*, sec. 214, note; *post*, sec. 235.

If members of a common council, who are required by the charter to be sworn before they enter on the duties of their office, are sworn before an officer not authorized to administer the oath, they are still officers *de facto*, and a tax levied by them is not invalid, and will not be set aside even in a direct proceeding. *State v. Perkins*, 4 Zab. (24 N. J. L.) 409 (1854). *Infra*, secs. 216, note, 221, note, 230, note, 237, note. Bond of *de facto* officer binding upon him and his sureties. *Green v. Wardwell*, 17 Ill. 278; *infra*, sec. 216, note. *Murfree*, Official Bonds, secs. 70, 71. But this principle does not apply where there is no office *de jure*. *Tinsley v. Kirby*, 17 S. C. 1, 8. *Post*, sec. 276.

An act of Congress provided that paymasters should, "*previous to entering upon the duties of their office, give good and sufficient bonds*," &c. It was held that an appointment as paymaster was complete

§ 216 (155). **Conditions of official Bond; Voluntary and Common-Law Obligations.**—The principle is well settled, that *official bonds* are valid if the *condition complies substantially* with the requirements of the statute. The exact form prescribed is not essential unless made so by the charter or act.<sup>1</sup> Duties of a nature and character similar to those belonging to the office may be added to it or imposed upon an officer; and these are held to be within the contemplation and the liability of obligors upon the bond.<sup>2</sup> As such bonds are

when made by the President and confirmed by the senate; that the giving of the bond was a mere ministerial act for the security of the government, and not a condition precedent to his authority to act as paymaster; and that a recital in the bond of the appointment estops the principal and sureties to deny the fact. *United States v. Bradley*, 10 Pet. (U. S.) 343 (1836); and see, also, *United States Bank v. Dandridge*, 12 Wheat. 64. Sureties of municipal treasurer *were estopped* to show that the election of the treasurer was unauthorized because the time of the election had not been fixed and the duties of the office prescribed by ordinance. *Paducah v. Cully*, 9 Bush (Ky.), 323 (1873); and see *post*, 216 note.

<sup>1</sup> *Allegheny County v. Van Campen*, 3 Wend. 49 (1829); *People v. Holmes*, 2 Wend. 281; *Ib.* 615; *Fellows v. Gilman*, 4 Wend. 414; *Lawton v. Erwin*, 9 Wend. 233; *Cornell v. Barnes*, 1 Denio, 85.

Bond *without seals* held valid as a common-law obligation. *Board of Education v. Fonda*, 77 N. Y. 350; *s. p.* *U. S. v. Linn*, 15 Pet. 290; *U. S. v. Hodson*, 10 Wall. 395; *Skellinger v. Yendes*, 12 Wend. 306; *Morse v. Hodsdon*, 5 Mass. 318; *Thomas v. White*, 12 Mass. 369; *Bank v. Smith*, 5 Allen, 415. So a bond without any *specified obligee*. *Fellows v. Gilman*, 4 Wend. 414, 419.

<sup>2</sup> *Board, &c. of Auburn v. Quick*, 99 N. Y. 138; *People v. Vilas*, 36 N. Y. 459, and cases cited. Mayor, &c. of New York *v. Kelly*, 98 N. Y. 467. See, also, *Board of Supervisors v. Clark*, 92 N. Y. 391. It is competent for the legislature, in exacting official bonds and prescribing their conditions, to require that they shall be conditioned for the faithful performance of *all duties that may be imposed by subsequent statutes* during the officer's continuance in

office; and this having been done by a general statute, the sureties on an official bond, conditioned as required by the statute, are liable for their principal's default in reference to additional duties subsequently imposed, unless the statute imposing such duties shows an intention that they shall not be so liable. *Morrow v. Wood*, 56 Ala. 1. *Infra*, secs. 230, 233.

In *Orman v. Pueblo*, 8 Col. 292, *Helm, J.*, enumerated the following propositions concerning the liability of sureties upon official bonds as elementary: "*First*, that the sureties on such bonds enter into contract thereof with reference to existing statutes on the subject, and that therefore the law becomes a part of the contract. *Second*, that the engagement or the obligation of the surety cannot be extended beyond the *strict terms* of the bond. *Third*, that when a breach thereof is assigned and an attempt is made to hold the surety, such breach must be based upon some *official misconduct* on the part of the principal."

So under the laws of *Indiana*,—providing for the issuance and sale of bonds to complete *water-works*,—it is the duty of the common council, and not of the city treasurer, to negotiate and sell such bonds; but the city treasurer is liable on his official bond for moneys received by him from the sale thereof, by whomsoever made. Such duty cannot be delegated by the council, by ordinance or otherwise, to the treasurer or any other person. Under an ordinance designating the city treasurer by name as agent for the sale of such bonds, his acts in negotiating such sales are simply those of an agent of the common council; and he is not liable on his official bond for the mere sale, assignment, and delivery thereof by him pursuant to such agency. In an action on his official bond

intended to secure the public the *courts do not favor mere technical defences*. Accordingly, actions have been sustained on bonds not required by law, when *executed voluntarily*, and with proper conditions, to secure the performance of official duty.<sup>1</sup> And when required by law, bonds are good, *as common-law obligations*, though they do not conform to the statute, if they contain no condition contrary to law. In such case the obligor voluntarily agrees to make the obligee named a trustee for the persons interested in the due performance of the condition.<sup>2</sup> Thus, an action may be maintained on a bond given to the "selectmen" instead of to the "town," by a town treasurer, conditioned for the faithful performance of his duties.<sup>3</sup>

for moneys alleged to have been received by him as such treasurer, an answer that by the terms of the negotiation, which was approved by the common council, the proceeds remained in the hands of the purchaser, to be used only as needed in constructing the water-works, and that the purchaser had become insolvent while the funds yet remained in his hands, — *Held*, to be sufficient. In such case, a report by the treasurer to the council, as to the condition of the fund, charging himself with funds remaining in the hands of the purchaser, — *Held*, not to estop him to deny his liability. *State v. Hauser*, 63 Ind. 155; as to liability for misapplication of funds, see *Robinson v. State*, 60 Ind. 26.

<sup>1</sup> *Supra*, sec. 214, note; *Postmaster-General v. Rice*, Gilpin, 554; *Montville v. Haughton*, 7 Conn. 543; *Commonwealth v. Wolbert*, 6 Binney, 292; *Baby v. Baby*, 8 Upper Can. Q. B. 76.

<sup>2</sup> *Thomas v. White*, 12 Mass. 369; 5 Mass. 314; *Kavanaugh v. Sanders*, 8 Greenl. (Me.) 442; *Sweetzer v. Hay*, 2 Gray, 49, and cases there cited; *Smith v. Wingate*, 61 Tex. 54; *Sutherland v. Carr*, 85 N. Y. 105; *Barnet v. Abbott*, 53 Vt. 120 (bond executed near the close of an officer's term of office, but *antedated*, to cover the entire term, held good). See, also, *Fond du Lac v. Moore*, 58 Wis. 170.

<sup>3</sup> *Sweetzer v. Hay*, 2 Gray, 49; *Horn v. Whittier*, 6 N. H. 88. A bond given by the treasurer of a county for the faithful performance of his official duties, to the board of supervisors of the same county, is a good and valid bond, notwithstanding

there *may be no statute requiring one*. *Supervisors v. Coffinbury*, 1 Mich. 355; *People v. John*, 22 Mich. 461 (1871); *Platteville v. Hooper*, 63 Wis. 381. The fact that there is already a valid official bond with solvent sureties does not preclude a county court from taking from a delinquent county officer, by way of security for his delinquency, a bond and mortgage on real estate. *Turner v. Clark Co.*, 67 Mo. 243 (1878).

Municipal corporations *may sue on official bonds* of public officers when interested therein. *State, &c. v. Norwood*, 12 Md. 177 (1858). In an action on the official bond of an officer appointed by a municipal corporation, reciting the appointment of the principal as such officer, neither he nor his sureties can set up the invalidity of his appointment as a defence to an action for moneys collected. *Hoboken v. Harrison*, 1 Vroom (30 N. J. L.), 73; *Seiple v. Elizabeth*, 3 Dutch. (N. J.) 407; *supra*, sec. 215, note. Sureties on *official bond of de facto* municipal officer are liable for moneys collected by him; and this though he held an office which in point of fact, the corporation could not create. 1 Vroom (30 N. J. L.), 73, *supra*. *Supra*, sec. 215, note; *post*, secs. 221, note, 230, note. A surety in an official bond of an officer whose *term is limited to a year*, is not liable beyond the year, though the officer continues by law until a successor is provided. *Dover v. Twombly*, 42 N. H. 59 (1860); *Chelmsford Co. v. Demorest* 7 Gray (Mass.), 1 (1856); *Mayor v. Horn*, 2 Harring. (Del.) 190 (1833); *Regina v. McRae*, 5 Upper Can. P. R. 309; *Mont-*

§ 217 (156). **Duration of Official Term; Power to hold over; English Statutes and Decisions.**—It was a settled rule of law respecting the old corporations in England that the office of the mayor or other head officer was *annual*, and absolutely expired at the end of the year; and that without an express clause in the charter, *he could not hold over* until his successor was provided. The right, in such case, to *hold over* did not exist by implication, and was not an incident to the office.<sup>1</sup> In some charters, however,

gomery v. Hughes, 65 Ala. 201. A change in a statute by which the time for the annual settlements of county collectors is fixed a month later, and additional time is allowed in which to pay after settlement, releases the sureties on a collector's bond executed before the change. The effect is to postpone the State's right of action against the collector. The rule that an *extension of time given the principal releases the surety* applies between the State and an individual. State v. Roberts, 68 Mo. 234. Sureties upon an official bond are *not liable* for a defalcation of their principal, occurring during a term preceding that for which the bond was given. Paducah v. Cully, 9 Bush (Ky), 323 (1872); Bissell v. Saxton, 77 N. Y. 191; Myers v. U. S. 1 McLean, 493; Mahaska v. Ingalls, 16 Iowa, 81; Townsend v. Everett, 4 Ala. 607; U. S. v. Boyd, 5 How. 50; Bruce v. U. S., 17 How. 437; McIntyre v. School Trustees, 3 Ill. App. 77; Arlington v. Merrick, 2 Saund. 403; Overacre v. Garrett, 5 Lans. 156; Rochester v. Randall, 105 Mass. 295; Bamford v. Iles, 3 Exch. 380; Austin v. French, 7 Met. 126; Kingston Ins. Co. v. Decker, 33 Barb. 196; Dedham Bank v. Chickering, 3 Pick. 335; Blake v. Buffalo, &c., 56 N. Y. 485; McClusky v. Cromwell, 11 N. Y. 598; Miller v. Stewart, 9 Wheat. 702; Stern v. People, 96 Ill. 475; Goodwine v. State, 81 Ind. 109, where a city treasurer served *two successive terms under bonds, with the same sureties on each bond*, it was presumed, in a suit upon the second bond, that, at the time it was given, he was in possession of all the money which he should have had, if an accounting had been had, and he and his sureties were held liable therefor. Bernhard v. Wyandotte, 33 Kan. 465; and see Hartford v. Francy, 47 Conn. 76. And where a collec-

tor, holding office for three successive years, and *giving a different bond each year*, was delinquent, and there was no evidence showing the time when the deficit occurred, it was held that the loss should be divided between the three bonds in proportion to the sums collected during the time for which each bond was given. Phippsburg v. Dickinson, 78 Me. 457. But in *California*, in a similar case, it was recently (1887) held that, in absence of evidence to the contrary, the presumption is that the misappropriation happened at the end of the last term, for which the sureties on the last bond are liable. Heppe v. Johnson, 78 Cal. 265. As to a breach of an official bond, see La Pointe v. O'Malley, 46 Wis. 35.

It is no objection to the bond that it was *executed before* the appointment to office was made. Essex v. Strong, 8 Upper Can. L. J. 15; s. c. 21 Upper Can. Q. B. 149. The imposition of additional taxes to those assessed at the time of taking the security and the increase of risk thereby has been held not to violate a bond given for the general performance of duties and payment of moneys. Beverley v. Barlow *et al.*, 10 Upper Can. C. P. 178; s. c. 7 Upper Can. L. J. 117. Nor is it a defence that the money received by the treasurer was not demanded by the government, which was entitled thereto. Essex v. Park, 11 Upper Can. C. P. 473. Nor are irregularities in the mode of appointment a defence. Whitby v. Harrison, 18 Upper Can. Q. B. 603; Whitby v. Flint, 9 Upper Can. C. P. 449; Todd v. Perry *et al.*, 20 Upper Can. Q. B. 649.

<sup>1</sup> Rex v. Atkins, 3 Mod. 12; Rex v. Hearle, 1 Str. 627; Mayor of Durham's Case, 1 Sid. 33; Rex v. Thornton, 4 East, 308; Foot v. Prowse, 1 Str. 625; s. c.

it was in terms provided that the mayor or other chief officer, though elected for a year, should hold until his successor was chosen.<sup>1</sup> When this right existed it was frequently abused, by neglecting to hold an election on the charter day, by which means the officer continued his term. It was this abuse that gave rise to the Statute of Anne, which enacted "that no person in such annual office for one whole year should be capable of being chosen into the same office for the year immediately ensuing," and imposed a fine upon every such officer who "should voluntarily and unlawfully obstruct and prevent the choosing of another person to succeed into such office at the time appointed for making another choice."<sup>2</sup> Under the Municipal Corporations Act the provision is that the mayor shall be elected each year, at the meeting fixed for the ninth of November, and shall "continue in his office for one whole year,"<sup>3</sup> and by an amendment, until his successor shall have accepted the office of mayor, and made and subscribed the requisite oath;<sup>4</sup> and subsequently the Statute of Anne above mentioned was repealed, as being no longer necessary.<sup>5</sup>

§ 218 (157). **Same subject.** — At common law, the office of an *alderman*, jurat, capital burgess, or other member of a select body, is a franchise for life, though by prescription or charter it may be limited to a definite period, but the office was so much in the nature of a freehold that there was an implied right to hold over, unless it was otherwise provided.<sup>6</sup> So with respect to recorder, town-clerk, and the like officers, the duration of the office depended upon the particular charter, but presumptively it was not limited, and their offices were so much in the nature of a freehold that if they were "eligible for a year" and were constituted in general terms, they did not expire with the year, but the possessors were entitled to hold over until others were elected. But it was considered that if they were "eligible for a year *only*," the office *ipso facto* determined on the expiration of a year.<sup>7</sup>

§ 219 (158). **American Doctrine; Right to hold over.** — In this country, however, a public office is *not* considered as being in the nature of a *grant or contract*, and the officer, as against the public,

3 Bro. P. C. 169; Willc. 293; Glover, 173.

<sup>1</sup> *Id.*; Rex v. Phillips, 1 Str. 394.

<sup>2</sup> 9 Anne, chap. xx. sec. 8.

<sup>3</sup> 5 and 6 Wm. IV. chap. lxxvi. sec. 49; *ante*, sec. 35, and notes; Reg. v. McGowan, 11 Ad. & E. 869.

<sup>4</sup> 6 and 7 Wm. IV. chap. cv. sec. 4.

<sup>5</sup> 3 and 4 Vict. chap. xlvii.

<sup>6</sup> Rex v. Doncaster, 2 Ld. Raym. 1564; Foot v. Prowse, *supra*.

<sup>7</sup> Willc. 296, pl. 766; Reg. v. Durham, 10 Mod. 147; Dighton's Case, 1 Vent. 82.

has no freehold or property in the office; and it is almost an invariable provision of law that all officers shall be elected or appointed for a fixed and definite period. To guard against lapses, sometimes unavoidable, the provision is almost always made in terms that the officer shall *hold until his successor is elected and qualified*. But even without such a provision, the American courts have not adopted the strict rule of the English corporations which disables the mayor or chief officer from holding beyond the charter or election day, but rather the analogy of the other corporate officers who hold over until their successors are elected, unless the legislative intent to the contrary be manifested.<sup>1</sup> Thus in Vermont it is held, — there being no statute to the contrary, and such having been the practice, — that school officers elected at the annual meeting hold over until others are elected at another annual meeting, whether more or less than a year from the time of their election.<sup>2</sup>

§ 220 (159). **Holding over.** — The law on the *subject of holding over* by corporate officers has been thus stated by a learned American judge: "Where, in the charter or organic law of a corporation, there is an express or implied restriction upon the time of holding office, as that the officers shall be annually elected on a particular day, and that they shall hold from one charter (election) day till the next, or that they shall be elected 'for the year ensuing *only*,' in such case they *cannot hold over* beyond the next election day or the end of the year."<sup>3</sup> "But where, by the constitution of the corporation, the

<sup>1</sup> *People v. Runkel*, 9 Johns. 147; *Slee v. Bloom*, 5 Johns. Ch. 366, 378; 2 Kent Com. 238; *Kelsey v. Wright*, 1 Root (Conn.), 83; *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479; *Lynch v. Laffland*, 4 Coldw. (Tenn.) 96; *South Bay, &c. Co. v. Gray*, 30 Me. 547; *Elmendorf v. Mayor, &c. of New York*, 25 Wend. (N. Y.) 693; *State v. Wilson*, 12 Lea (Tenn.), 246. And see cases *infra*. For the rule when officers resign to avoid service of process, see *post*, sec. 887.

<sup>2</sup> *Chandler v. Bradish*, 23 Vt. 416 (1851).

"The better opinion," says *Shaw*, C.J. *arguendo*, in *Overseers of Poor, &c. v. Sears*, 22 Pick. 122, 130, "is that town officers *annually* chosen hold their offices until others are chosen and qualified in their place." *School District v. Atherton*, 12 Met. (Mass.) 105 (1846); *Dow v. Bullock*, 13 Gray (Mass.), 136 (1859). So in *Illinois*. *People v. Fairbury*, 51 Ill.

149 (1869). So in *Connecticut*, an officer elected for "the year ensuing" is, in the absence of any other restrictive provision, entitled to hold beyond the year, and until he is superseded by the election of another person in his place. *McCall v. Byram Manuf. Co.*, 6 Conn. 428 (1827), where the authorities are reviewed and commented on by *Hosmer*, C. J.; s. p. *Cong. Soc. &c. v. Sperry*, 10 Conn. 200; *State v. Fagan*, 42 Conn. 32 (1875); *Wier v. Bush*, 4 Litt. (Ky.) 433. Where, by statute, an officer holds for a given term, and "until his successor is elected and qualified," he continues in office until his successor is duly elected and qualified, though this (from failure to elect, or from other causes) be after the expiration of the term. *Stewart v. State*, 4 Ind. 396 (1853); *Tuley v. State*, 1 Ind. 500, 515; *Lawhorne, In re*, 18 Gratt. (Va.) 85.

<sup>3</sup> *Tuley v. State*, 1 Ind. (Cart.) 500. 502 (1849), *per Perkins*, J.; *King v.*

officers are elected for a term, and until their successors are elected and qualified, or where they are elected 'for the year ensuing,' and the charter or organic law contains no restrictive clause, the officers *may continue to hold* and exercise their offices, after the expiration of the year, until they are superseded by the election of other persons in their places."<sup>1</sup>

§ 221 (160). **Right to hold over as against the State.** — As against the public, however, officers cannot found a valid title or *right to*

Mayor, &c., 6 Vin. Abr. 296; Corporation of Banbury, 10 Mod. 346; Rex v. Passmore, 3 Term R. 199; 6 Petersd. Abr. 738. But whether a provision merely that an officer shall "be annually elected on a particular day" is an implied restriction that he shall not hold over, see the cases in *Vermont*, *Massachusetts*, *New York*, *Illinois*, and *Connecticut*, above cited. The weight of authority in this country is the other way. Where a city charter gave the mayor power to hold until his successor was elected and qualified, but denied this power to the members of the city council by providing that they should be elected for a specified term, "and no longer," and that their seats should be vacated at the end of such term, they cannot hold over, and their action, after the time thus fixed, is void, and does not bind the corporation. *Louisville v. Higdon*, 2 Met. (Ky.) 526 (1859). When the law is silent as to the term, but requires an election to be held every two years, an officer holds over until his successor is provided. *Cordell v. Frizzell*, 1 Nev. 130.

<sup>1</sup> *Per Perkins, J., Tuley v. State*, 1 Ind. (Cart.) 500, 502 (1849) (action on official bond against sureties). The *Queen v. Owens*, 2 E. & E. 86; *Frost v. Chester*, 5 E. & B. 531; *Foot v. Prowse*, Str. 625; *Queen v. Durham*, 10 Mod. 146; *King v. Lisle*, Andrews, 163; *McCall v. Manufacturing Co.*, 6 Conn. 428; 9 Conn. 536; 10 Conn. 200; 17 Conn. 588; *Kelsey v. Wright*, 1 Root, 83; *Wier v. Bush*, 4 Litt. (Ky.) 429; *Wheeling v. Black*, 25 W. Va. 266; *People v. Runkel*, 9 Johns. (N. Y.) 147; *Vernon Society v. Hills*, 6 Cow. (N. Y.) 23; *Slee v. Bloom*, 5 Johns. Ch. (N. Y.) 366; *Pender v. King*, 6 Vin. Abr. 296; 2 Kent Com. 295, note b;

*Hicks v. Launcelot*, 1 Rol. Abr. 513; *Bank v. Petway*, 3 Humph. (Tenn.) 522; *Stewart v. State*, 4 Ind. 396; *Rex v. Poole*, Cas. temp. Hardw. 23, and *Phillips v. Wickham*, 1 Paige Ch. 590, were considered to have a contrary bearing. It was decided, in *Beck v. Hanscom*, 9 Fost. (29 N. H.) 213, 222 (1854), that where the charter or incorporating act made no provision for the continuance of corporate officers in office after the expiration of the term for which they were elected, they could not hold over until others should be chosen and qualified; citing the opinion of Chancellor *Walworth*, in *Phillips v. Wickham*, 1 Paige, 590; but admitting that *The People v. Runkle*, 9 Johns. (N. Y.) 147, and *Trustees v. Hills*, 6 Cow. (N. Y.) 23, held a different view. In *People v. Tieman*, 8 Abb. Pr. 359; s. c. 30 Barb. (N. Y.) 193, the Supreme Court, at special term, denied that the officer himself could hold over unless authorized by statute, though to protect the public his acts are sustained. See *Cocke v. Halsey*, 16 Pet. 71. One holding a municipal office, under a valid appointment, is not precluded from continuing to act thereunder until his successor is elected and qualified, by the mere fact that he has taken an oath and filed an official bond under an illegal election. *Forristal v. People*, 3 Ill. App. 470. Under the Constitution and laws of *Virginia*, officers *must qualify before* the day on which their terms begin, and on failure to do so the offices are vacant. In such case the incumbents continue to perform the duties of the office after the expiration of their own terms until their successors are qualified. *Johnson v. Mann*, 77 Va. 265; see *supra*, sec. 214, note.



*hold over upon their own neglect of duty.* Therefore, where the charter made it the express duty of the trustees in office to give notice of, and themselves to hold, the annual elections, it was held that if they omitted to discharge this duty, though inadvertently, in consequence of which omission there was and could be no election, that they were not entitled to hold over, although by the charter it was provided that they should continue in office until a new election should be made and their successors should qualify.<sup>1</sup>

§ 222 (161). **Vacancies in Municipal Offices, when filled.**—At common law there must be a vacancy in the office existing at the time of the election; “for one cannot,” says Mr. Willcock, “be elected to a corporate office in reversion.”<sup>2</sup> The same doctrine has been recognized in this country, and a vacancy must exist before an election to fill it can be ordered,<sup>3</sup> and an election to fill an anticipated vacancy is not valid unless expressly authorized by the charter or statute.<sup>4</sup> Elections, however, in advance of the expiration of the regular term of the incumbent of an office, are always provided for and held, but such cases are not elections to vacancies within the meaning of the rule under consideration. Where the charter provides that in case of the absence of the mayor from the city, another

<sup>1</sup> *People v. Bartlett*, 6 Wend. (N. Y.) 422 (1831). In such a case, being trustees *de facto*, their acts would be good. And their title would also be good except when called in question by *quo warranto*. *Id.*; *Lynch v. Laffland*, 4 Coldw. (Tenn.) 96 (1867). *Validity of acts of officers de facto*. *Ante*, secs. 215, note, 216, note. *People v. Stevens*, 5 Hill (N. Y.), 616, *per* Bronson, J.; *People v. Runkle*, 9 Johns. (N. Y.) 147; *Trustees v. Hill*, 6 Cow. (N. Y.) 23; *Plymouth v. Painter*, 17 Conn. 585; *Smith v. State*, 19 Conn. 493; *People v. Bartlett*, 6 Wend. (N. Y.) 422; *State v. Jacobs*, 17 Ohio, 143; *Hinton v. Lindsay*, 20 Ga. 746; *post*, secs. 276, 892. The unconditional repeal of a municipal charter abolishes all the offices under it; so also does the substitution of a new charter having inconsistent provisions, and not providing for the rights of officers under the old charter. *Crook v. People*, 106 Ill. 237. See this case also as to who are “the city officers then in office,” as used in the Incorporation Law of Illinois.

<sup>2</sup> *Willc. Corp.* 207, pl. 526; *Hob.* 150; *Skin.* 45; *Glover*, 216.

<sup>3</sup> *Lindsey v. Luckett*, 20 Tex. 516;

*Biddle v. Willard*, 10 Ind. 63 (1857); *People v. Witherell*, 14 Mich. 48.

<sup>4</sup> *Biddle v. Willard*, *supra*. In this case it was said, that a resignation to take effect at a fixed future time may, if no new rights have attached, be withdrawn, even after acceptance, by the consent of the party accepting; and under the laws of that State it was held that such a resignation did not create a vacancy which would authorize an election at a period prior to the taking effect of the resignation. See *infra*, secs. 225, note, 226, note.

There is no technical or peculiar meaning to the word “vacant,” as used in the Constitution. It means empty, unoccupied, as applied to an office without an incumbent. There is no basis for the distinction urged that it applies only to offices vacated by death, resignation, or otherwise. An existing office, without an incumbent, is vacant, whether it be a new or an old one. *Per Stuart, J.*, *Stocking v. State* (vacancy in new judicial circuit), 7 Ind. 326 (1855); followed, *Collins v. State*, 8 Ind. 344 (1856).

officer shall act as mayor only such an absence as will render the mayor unable to perform the duties of his office is intended.<sup>1</sup>

§ 223 (162). **Refusal to serve in Office.**—It is an established *common-law principle* in England, that since a municipal corporation is entitled to the official service of its eligible members, it may, by virtue of its inherent or incidental power, pass a by-law imposing a pecuniary penalty upon such as *refuse*, without legal excuse, *an office* to which they have been duly elected.<sup>2</sup> The ground of this doctrine is clearly set forth by Lord Holt in *Vanacker's Case*, and although all of his reasoning is not applicable to our American municipal corporations, still it is believed that under the usual general welfare clause or under their incidental power to pass reasonable and necessary by-laws, they would be authorized, where such an ordinance did not contravene the charter or statute, or public legislative policy respecting offices, to impose a reasonable fine for refusing corporate offices. In *this country*, however, offices have not usually been regarded as burdens to be avoided, but rather as distinctions to be coveted, and hence there has been little occasion to call into exercise the power of the courts, or to test the authority of the corporations to enforce the undertaking of their offices. If, however, under the charter or statute, or the law or policy of the State, an officer has the *right to resign* or lay down his office at pleasure, as is usually the case with us, the authority to impose a fine for refusing to serve would probably not exist.<sup>3</sup>

<sup>1</sup> *Detroit v. Moran*, 46 Mich. 213.

<sup>2</sup> *City of London v. Vanacker*, 1 Ld. Raym. 496; s. c. Carth. 482; s. c. 12 Mod. 272; 1 Salk. 142; *Rex v. Bower*, 2 Dowl. & R. 761, 842; s. c. 1 Barn. & Cress. 587; *Vintners' Co. v. Passey*, 1 Burr. 239; Willc. 230; *Glover*, 181; *Grant*, 211. If of a public and magisterial nature, the penalty for refusal may be imposed, though the person be also liable to be punished by indictment, or, in the discretion of the court, by criminal information. *London v. Vanacker*, 1 Ld. Raym. 499; *Rex v. Grosvenor*, 1 Wils. 18; s. c. 2 Str. 1193; *Rex v. Hungerford*, 11 Mod. 132, 142; *Rex v. Woodrow*, 2 Term R. 732; *Rex v. Whitwell*, 5 Term R. 86; *Rex v. Leyland*, 3 M. & S. 184. The Municipal Corporations Act (5 and 6 Wm. IV. chap. lxxv.) sec. 51, Munic. Corp. Act. 1882, sec. 34) requires every qualified person elected to the office of alderman,

councillor, auditor, or assessor, or mayor, to accept the office or pay a fine to the borough fund. The refusal to take the requisite oaths is a refusal of the office. *Exeter v. Starre*, 2 Show. 159. As there is a common-law duty to serve in an office to which a person has been duly elected, this duty may, if the office be sufficiently important, be enforced by *mandamus*, and the payment of the fine is not in lieu of service, unless the statute or by-law release him from service by treating the penalty as compensation. *Rex v. Bower*, 1 Barn. & Cress. 585; s. c. 2 Dowl. & R. 842; *Rex v. Leyland*, 3 Maule & Sel. 184; *Rex v. Woodrow*, 2 Term R. 731; *post*, sec. 830. By the above-mentioned provision of the Municipal Corporations Act of 5 and 6 Wm. IV., the fine is in lieu of the acceptance of the office. *Grant on Corp.* 222.

<sup>3</sup> See Willc. 133, pl. 308; *Grant*, 221,

§ 224 (163). **Resignation of Municipal Offices.** — An office *must be resigned* either (first) expressly, or (second) by implication.<sup>1</sup> If the charter prescribes the *mode* in which the resignation is to be made, that mode should of course be complied with.<sup>2</sup> *Acceptance* by the corporation is, at common law, necessary to a consummation of the resignation, and until acceptance by proper authority, the tender or offer to resign is revocable.<sup>3</sup> But if the statute provides that an officer may resign at pleasure and that his resignation shall take effect when filed, the principle just stated does not apply, and when his resignation is filed, he ceases to be an officer.<sup>4</sup> The right to accept a resignation is a power incidental to every corporation.<sup>5</sup> It is also a common-law principle that the right to *accept the resignation* of an officer is incidental to the power of appointing him.<sup>6</sup> If *no particular mode* is prescribed, neither the resignation nor acceptance thereof need be in writing, or in any form of words.<sup>7</sup>

222; *post*, sec. 226, note; *Gates v. Delaware County*, 12 Iowa, 405; *United States v. Wright*, 1 McLean, 509; *State &c. v. Ferguson*, 31 N. J. L. (2 Vroom) 107.

<sup>1</sup> *Regents of University v. Williams*, 9 Gill & J. (Md.) 365, 422 (1838); *Willc.* 132, 238; *Grant*, 268, 246, note *c*; *Ib.* 221, 222.

<sup>2</sup> *Willc.* 239; *Rex v. Hughes*, 5 Barn. & Cress. 886, 896; *Rex v. Mayor of Ripon*, 1 Ld. Raym. 563; *Rex v. Payne*, 2 Chitty, 366; *Reg. v. Merton*, 4 Q. B. 146. The statute may provide that the officer shall continue until his successor is elected and qualified, and in such case he will not cease to be an officer merely by resigning so as to be *relieved from the discharge of his duties* as such officer. *Badger v. United States*, 93 U. S. 599 (1876) (*mandamus*); *Amy v. Watertown*, 130 U. S. 302 (1889). See, further on this point, *post*, sec. 887.

<sup>3</sup> *Reg. v. Lane*, 2 Ld. Raym. 1304; *Rex v. Ripon*, *supra*; *Hazard's Case*, 2 Rol. 11; *Jenning's Case*, 12 Mod. 402; *Rex v. Patteson*, 4 B. & Ad. 9; 1 Nev. & Mann. 612. The acceptance may be by entry in books, by vote, or resolution, or by treating the place as vacant and electing another to fill it, or ordering an election if to be filled by a popular vote. *Van Orsdall v. Hazard*, 3 Hill (N. Y.), 243; *State v. Ancker*, 2 Rich. (S. C.) 245. One elected to an office cannot *resign* it before

he has qualified and become an incumbent of it. *Miller v. Supervisors, &c.*, 25 Cal. 93; *Willc.* 236.

<sup>4</sup> *Amy v. Watertown* (No. 1), 130 U. S. 302 (1889), distinguishing *Badger v. United States*, *supra*. *Post*, sec. 887 *a*.

<sup>5</sup> *Rex v. Tidderley*, 1 Sid. 14; *Hazard's Case*, *supra*. The "common council" may regulate resignations by by-laws, and it may accept resignations, as it represents the corporation at large. *Rawlinson* (5th ed.) 317, note; *Staniland v. Hopkins*, 9 M. & W. 178; *Willc.* 240, pl. 615.

<sup>6</sup> *Van Orsdall v. Hazard*, 3 Hill (N. Y.), 243; asserting, *arguendo*, the incidental power of municipal corporations, *as such*, to accept resignations, and approving the opinion of Mr. Willcock (Munie. Corp. 240), who observes, respecting the cases on this subject: "I presume that a right to accept a resignation passes incidentally with a right to elect." See, also, *Rex v. Tidderley*, 1 Sid. 14, *per Hale*, Ch. B.; *Jenning's Case*, 12 Mod. 402; *Taylor's Case*, Poph. 133. The English Municipal Corporations Act 1882, sec. 36, provides that any "person elected to a corporate office may at any time by writing signed by him, and delivered to the town-clerk, resign the office, on payment of the fine provided for non-acceptance thereof."

<sup>7</sup> Same authorities; and see, also, *Rex v. Ripon*, 1 Ld. Raym. 563; s. c. 2 Salk. 433; *Regina v. Lane*, 1 Ld. Raym. 1304; *Jenning's Case*, 12 Mod. 402; *Regina v.*

§ 225 (164). **Implied Resignation; Incompatible Office.** — An office may be *impliedly resigned* or vacated by the incumbent being elected to and accepting an *incompatible office*. The rule, says Parke, J., in a leading English case on this subject, that where two offices are incompatible they cannot be held together, is founded on the plainest principles of public policy, and has obtained from very early times.<sup>1</sup> The principle applies not only where the second office is the superior and more important one, but also where it is not.<sup>2</sup> The rule has been generally stated in broad and unqualified terms, that the acceptance of the incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither *quo warranto* nor *amotion* being necessary.<sup>3</sup>

§ 226 (165). **Same subject. Acceptance of Resignation.** — The doctrine just stated is undoubtedly true where the acceptance of the second office is made by or with the privity of that authority which has the power to accept the surrender of the first or to remove from it; but "such acceptance does not operate as an absolute avoidance, in cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or removal, unless that authority is privy and consent-

Gloucester, Holt R. 450; Van Orsdall v. Hazard, 3 Hill (N. Y.), 243, 248; State v. Allen, 21 Ind. 516 (1863); People v. Police Board, 26 N. Y. 316; McCunn's Case, 19 N. Y. 188, distinguished. Statutory limitation on the right to resign before successor is chosen and qualified. Badger v. United States, 93 U. S. 599 (1876); People v. Common Council, 77 N. Y. 503, approving text. A resignation made to the officer who makes the appointment vacates the office as soon as it is received; there is no acceptance necessary. Gilbert v. Luce, 11 Barb. (N. Y.) 91; Olmsted v. Dennis, 77 N. Y. 379.

<sup>1</sup> Per Parke, J., Rex v. Patteson, 4 Barn. & Adol. 9 (1832); 1 Nev. & Mann. 612; Regents of the University v. Williams, 9 Gill & Johns. (Md.) 365 (1838); 1 Kyd, 369-375; State v. Butz, 9 S. C. 156; People v. Hanifan, 96 Ill. 420.

By the common law, when two offices or public trusts are incompatible with each other, a person holding the one is not disqualified to be appointed or elected to the

other, but his acceptance of the second office is in law an implied resignation of the first, whenever it may be resigned by the mere act of the incumbent without the assent or concurrence of a superior authority. Per Gray, C. J., in Commonwealth v. Hawkes, 123 Mass. 525 (1878). The rule that one vacates an office by accepting another office incompatible therewith, — applied to a solicitor's acceptance of the office of representative in Congress. State v. Butz, 9 S. C. 156; post, sec. 427, note. <sup>2</sup> Milward v. Thatcher, 2 Term R. 87, which settled this point conclusively; Rex v. Trelawney, 3 Burr. 1615; Gabriel v. Clerke, Cro. Eliz. 76; Rex v. Godwin, Doug. 397, note 22; Willc. 240, pl. 617; Glover, 139.

<sup>3</sup> Gabriel v. Clerke, *supra*; Verrior v. Sandwich, 1 Sid. 305; Milward v. Thatcher, *supra*; Glover, 329; Willc. 240, pl. 617. Where a resignation is to take effect at a future day the council may fill the vacancy before that day. Leech v. The State, 78 Ind. 570. *Supra*, sec. 222, note.

ing to the second appointment.”<sup>1</sup> If one holding an office in a corporation be by that corporation elected to an incompatible office, this, of course, is a consent on the part of the corporation that the first office be vacated; and if the second office be accepted, the first is at once and *ipso facto* determined. But, until acceptance, the former office is not vacated.<sup>2</sup>

§ 227 (166). **Incompatible public Offices.** — The rule under consideration is not limited to corporate offices, but extends, both in its principle and application, to all public offices. Thus, if a judge of the Common Pleas accepts an appointment to the King’s Bench, the first office is vacated, since it is the duty of the one to correct the errors of the other.<sup>3</sup> Whether offices are incompatible depends upon the charter or statute, and the nature of the duties to be performed.<sup>4</sup> The same man cannot be judge and minister in the same court, and hence the offices are not compatible.<sup>5</sup> Where the re-

<sup>1</sup> *Parke, J., Rex v. Patteson, supra.* It has been held in this country, however, that an incumbent of a public office may lay it down at his pleasure, and that the officer to whom the resignation, by law, is to be made cannot forbid it or refuse it; and that when received by such officer it operates to vacate the office resigned. *Gates v. Delaware County*, 12 Iowa, 405; *United States v. Wright*, 1 McLean, 509. The delivery by a city engineer, whose office was elective, of a written resignation to the mayor and council, takes effect without any acceptance. *State v. Mayor of Lincoln*, 4 Neb. 260 (1877). *Lake, C. J.*, says: “In absence of statute, there is no rule requiring acceptance of resignation to make it effective. The refusal of the municipal authorities to accept it will not compel the officer to retain the office against his will.” *Ib.* Compare *State v. Ferguson*, 2 Vroom (31 N. J. L.), 107, 129; *Lewis v. Oliver*, 4 Abb. Pr. R. 121; *People v. Porter*, 6 Cal. 26. Denying right under statute to withdraw resignation after delivering it. *State v. Hauss (sheriff)*, 43 Ind. 105 (1873); s. c. 13 Am. Rep. 314. *Ante*, sec. 222, note.

<sup>2</sup> *Ib.*; *Milward v. Thatcher, supra*; *Rex v. Pateman, supra*; *Willc.* 243, pl. 623; *Arkwright v. Cantrell*, 7 Ad. & E. 565. Acceptance necessary; see, also, *State v. Ferguson*, 2 Vroom (31 N. J. L.), 107

(1864); see *Lewis v. Oliver*, 4 Abb. Pr. 121. Acceptance of an incompatible office, even under a void election, puts an end to the first office; and the officer, on being ousted from the second office, cannot be restored to the first. *Rex v. Hughes*, 5 B. & C. 886; *Rex v. Bond*, 6 D. & R. 333.

<sup>3</sup> *Glover on Corp.* 139.

<sup>4</sup> *Milward v. Thatcher, supra, per Buller, J.*; *People v. Carrique*, 2 Hill (N. Y.), 93, and cases cited; *Staniland v. Hopkins*, 9 M. & W. 178.

*Incompatibility in offices* exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. It does not necessarily arise when the incumbent places himself, for the time being, in a position where it is impossible for him to discharge the duties of both offices (*Bryan v. Cattell*, 15 Iowa, 538 (1864), *per Wright, C. J.*); and accordingly that case held that the office of district attorney and of captain in the volunteer service of the United States were not legally incompatible. Two offices are incompatible where the holder cannot, in every instance, discharge the duties of each. *Per Bailey, J., Rex v. Tizzard*, 17 Eng. C. L. 193.

<sup>5</sup> *Poph.* 28, 29; 1 *Sid.* 305; 2 *Keb.* 93; *Glover*, 139.

order is an adviser to the mayor, the two offices cannot be held together.<sup>1</sup> So a representative in Congress holds a *public office*, within the meaning of a charter which prohibits an alderman from holding "any other public office;" and upon his election to and acceptance of "such public office" during his term as alderman, his office as alderman immediately becomes vacant.<sup>2</sup> The proper proceeding is by *mandamus*<sup>3</sup> to compel the common council to order a special election to fill such vacancy, and not by *quo warranto* to try the title to such office, such representative being neither a *de facto* nor *de jure* officer.

§ 228 (167). **Abandonment of Office.** — An office may be *vacated by abandonment*.<sup>4</sup> A *voluntary enlistment* by a civil officer in the *military service* of the United States for three years, or during the war, vacates the civil office, being a constructive resignation by abandonment.<sup>5</sup> So where *residence within the corporation* is necessary in order to be eligible to hold an office, permanent removal from the municipality may undoubtedly be taken as evincing an intention to resign, and as an implied resignation.<sup>6</sup>

§ 229 (168). **Compensation of Municipal Officers.** — We have had occasion to discuss the *complete supremacy of the legislature* over public corporations, limited only by constitutional restraints.<sup>7</sup> Its authority over public offices, which are created or authorized solely for the public convenience, is equally great,<sup>8</sup> and may be conferred upon municipal corporations with respect to municipal offices. The legislature, in the absence of constitutional limitation, may create and abolish offices, add to or lessen their duties, abridge or extend the

<sup>1</sup> Willc. 241, pl. 518; *Rex v. Marshall*, cited, 2 B. & A. 341. *Clerk of a school district and collector of the district* were held not incompatible, and the same person may, therefore, be appointed to both offices, there being no prohibition in the act. *Howland v. Luce*, 16 Johns. (N. Y.) 135 (1819). The offices of *councilman and city marshal* are incompatible. *State v. Hoyt*, 2 Oreg., 246. See generally as to incompatible *State and Federal offices*, *Republica v. Dallas*, 3 Yeates (Pa.), 316; s. c. 4 Dall. 229; *Commonwealth v. Binns*, 17 Serg. & Rawle (Pa.), 219; *Commonwealth v. Ford*, 5 Barr (Pa.), 67.

<sup>2</sup> *People v. Common Council*, 77 N. Y. 503; *People v. Carrique*, 2 Hill (N. Y.), 93; *People v. Nostrand*, 46 N. Y. 381; *People v. Green*, 58 N. Y. 304.

<sup>3</sup> *Lamb v. Lynd*, 44 Pa. 336; *State v. Rahway*, 33 N. J. L. 110; *Fish v. Weatherwax*, 2 Johns. Cas. 217.

<sup>4</sup> Willc. 238; *State v. Allen*, 21 Ind. 516 (1863). In *People v. Hanifan*, 96 Ill. 420, the refusal of an alderman to attend council meetings was held to be an abandonment of the office.

<sup>5</sup> *State v. Allen*, 21 Ind. 516 (1863). But see *Bryan v. Cattell*, 15 Iowa, 538.

<sup>6</sup> Willc. 238; *ante*, sec. 195; *Curry v. Stewart*, 8 Bush (Ky.), 560 (1871).

<sup>7</sup> *Ante*, chap. iv.

<sup>8</sup> *Ante*, chap. iv.; *State v. Douglass*, 26 Wis. 428 (1870); s. c. 7 Am. Rep. 87, and note. As to special constitutional restrictions, *ante*, secs. 58, 60.

term of office, and increase, diminish, or regulate the compensation of officers at its pleasure.<sup>1</sup> But after the services are rendered there is an *implied* (if not express) *contract* to pay therefor at the rates fixed by the ordinance or law in force, at the date when the services were rendered, which contract cannot be impaired by subsequent legislation. Hence, where the law in force at the date when a county district attorney rendered services, provided for the levy of taxes for county purposes at a specified maximum rate, and after the services were rendered a constitutional provision was adopted restricting the limit of taxation, it was held that such restrictive provision impaired the obligation of the plaintiff's contract *pro tanto*, and was, to that extent, void, and that the plaintiff was entitled to a *mandamus* to the county officers, to levy and collect a tax under the law on this subject which was in force when his services were rendered.<sup>2</sup>

§ 230 (169). **Compensation of Officers.** — There is *no such implied obligation* on the part of municipal corporations, and no such relation

<sup>1</sup> *Ante*, chap. iv.; and see also *Conner v. Mayor, &c. of New York*, 1 Seld. (5 N. Y.) 285 (1851); affirming s. c. 2 Sandf. S. C. R. 355; *Warner v. People*, 7 Hill (N. Y.), 81; 2 Denio, 272; *People v. Morrell*, 21 Wend. (N. Y.) 563 (1839); *Phillips v. Mayor, &c. of New York*, 1 Hilt. (N. Y. Com. Pl.) 483; *Bryan v. Cattell*, 15 Iowa, 538, 553, *per Wright*, C. J.; *Coffin v. State*, 7 Ind. 157 (1855); *People v. Mahaney*, 13 Mich. 481; *Turnpen v. County Comm'rs*, 7 Ind. 172; *Oregon v. Pyle*, 1 Oreg. 149; *Bird v. Wasco Co.*, 3 Oreg. 282 (1871); *Cowdin v. Huff*, 10 Ind. 83; *Cooley, Const. Lim.* 276; *Butler v. Pennsylvania*, 10 How. 402; *Smith v. New York*, 37 N. Y. 518 (1868); *Swann v. Buck*, 40 Miss. 268 (1866). While the office is continued, and the officer not removed, he is entitled to salary. *Hoke v. Henderson*, 4 Dev. (N. C.) 1; *Cotton v. Ellis*, 7 Jones (N. C.) Law, 545. An officer holding over and continuing to discharge his official duties until his successor was qualified, was held to be entitled to compensation for the time without an express provision to that effect. *Robb v. Carter*, 65 Md. 321. A constitutional amendment prohibiting the legislature from *increasing the compensation* of a public officer during his

*continuance* in office refers only to his holding under one appointment. *Smith v. City of Waterbury*, 54 Conn. 174. The same provision was declared to render illegal a vote of a city council to pay a joint standing committee for services rendered, though the office of councilman had no compensation attached to it. *Garvie v. Hartford*, 54 Conn. 441. A salary may be *reduced* during an official term. *Harvey v. Rush County*, 32 Kan. 159. An ordinance of a city is not a "law" within the meaning of the Constitution of *Pennsylvania* providing that "no law shall extend the term of any public officer or increase or diminish his salary, &c., after his election." *Baldwin v. Philadelphia*, 99 Pa. St. 164 (1881). Statute authorizing the common council to increase compensation of police justices for additional duties imposed upon them, was held to authorize only one increase, and a second increase was held to be invalid. *Cox v. New York*, 103 N. Y. 519.

<sup>2</sup> *Fisk v. Jefferson Police Jury*, 116 U. S. 131 (1885). Limit of taxation fixed when debt was created cannot be exceeded unless the limit has been enlarged by subsequent statutes. *Stewart v. Jefferson Police Jury*, 116 U. S. 135.

between them and officers which they are required by law to elect, as will oblige them to *make compensation* to such officers, *unless the right to it is expressly given* by law, ordinance, or by contract.<sup>1</sup> Officers of a municipal corporation are deemed to have accepted their office with knowledge of, and with reference to, the provisions of the charter or incorporating statute relating to the services which they may be called upon to render, and the compensation provided therefor. Aside from these, or some proper by-law, there is *no implied assumpsit* on the part of the corporation with respect to the services of its officers. In the absence of express contract, these determine and regulate the right of recovery, and the amount.<sup>2</sup> If the charter or by-laws provide for a peculiar mode of compensation, as, for example, to a city surveyor for superintending grading of streets, by an assessment upon the property owners, the city is not liable before it collects the money, if it makes the requisite assessments, and is proceeding with proper diligence to enforce them.<sup>3</sup>

<sup>1</sup> *Sikes v. Hatfield*, 13 Gray (Mass.), 347 (1859); *Barton v. New Orleans*, 16 La. An. 317; *Garnier v. St. Louis*, 37 Mo. 554; *Rowe v. County of Kern*, 72 Cal. 353; *White v. Levant*, 78 Me. 568; *Perry v. Cheboygan*, 55 Mich. 250; *Haswell v. New York*, 81 N. Y. 255. It is advisable that salaries should be fixed by ordinance, and not voted as a matter of grace and favor. *Smith v. Commonwealth*, 41 Pa. St. 335; *Devoy v. New York*, 39 Barb. (N. Y.) 169; *Bladen v. Philadelphia*, 60 Pa. St. 464. See opinion of *Thompson, C. J.*, *Philadelphia v. Given*, *Ib.* 136. Municipal corporations are not liable for services performed by an officer under an unconstitutional statute. *Meagher v. County*, 5 Nev. 244 (1869); *post*, sec. 910; *City of Central v. Sears*, 2 Col. 588 (1875). The first sentence of this section of the text cited and applied in *Bosworth v. New Orleans*, 26 La. An. 494, 495 (1874). An officer suspended without sufficient cause and another appointed in his place cannot recover for salary subsequently accruing until there has been an adjudication in a direct proceeding declaring him entitled to the office and that the incumbent was a usurper. *Selby v. Portland*, 14 Oreg. 243. Where, at the time an officer is elected, his salary has not been fixed, an ordinance passed during his term fixing his salary, is not a violation of the constitutional restriction upon enlarging or di-

minishing the salary of an officer during his term of office. *State, ex rel. v. McDowell*, 19 Neb. 442; *Wheelock v. McDowell*, 20 Neb. 160. See also *Purcell v. Parks*, 82 Ill. 346; *Rucker v. Supervisors*, 7 W. Va. 661. If the legislature shortens an officer's term of office he cannot recover his salary for his unexpired term. *Long v. New York*, 81 N. Y. 425. A *de facto* officer cannot recover the salary annexed to the office; the salary is an incident to the office and not to its occupation. *Burke v. Edgar*, 67 Cal. 182; *Meehan v. Hudson*, 46 N. J. L. (17 Vroom) 276. Further as to *de facto* officers, see *ante*, secs. 215 n., 221 n., 230 n., 235 n., 237 n., 256 and note.

<sup>2</sup> *Locke v. Central City*, 4 Col. 65. A public officer is not entitled to payment for duties imposed upon him by statute in the absence of an express provision for such payment. *Jones v. Carmarthen*, 8 M. & W. 605; *Askin v. London*, 1 Upper Can. Q. B. 292; *Pringle and McDonald, In re*, 10 Upper Can. Q. B. 254; *Regina v. Cumberlege*, 36 L. T. N. s. 700; *Brazil v. McBride*, 69 Ind. 244; *Doolan v. Manitowoc*, 48 Wis. 312; *supra*, sec. 216.

<sup>3</sup> *Baker v. City of Utica*, 19 N. Y. 326; *People v. Supervisors*, 1 Hill (N. Y.), 362; *Cumming v. Mayor, &c. of Brooklyn*, 11 Paige, 596; *Jersey City v. Quaipe*, 2 Dutch. (N. J.) 63; *Andrews v. United States*, 2 Story C. C. 203; *United States*



§ 231 (170). **Power to abolish Office, and to regulate and to change Salary.** — A municipal corporation *may*, unless restrained by charter, *abolish an office created by ordinance*; and may also, unless the employment is in the nature of a contract, *reduce or otherwise regulate the salaries and fees* of its officers, according to its view of expediency and right. Although an officer may be elected or appointed for a fixed period, yet where he is not bound, and cannot be compelled to serve for the whole time, such election or appointment cannot be considered a contract to hire for a stipulated term. Ordinances fixing salaries are *not in the nature of contracts* with officers.<sup>1</sup>

*v. Brown*, 9 How. 487; *Barton v. New Orleans*, 16 La. An. 317; *McClung v. St. Paul*, 14 Minn. 420 (1869); *Smith v. Commonwealth*, 41 Pa. St. 335. "It is very plain to us that a town officer, *as such*, has no legal claim against the town to recover pay for services rendered, unless by an express vote of the town, or a uniform usage to pay that particular officer from year to year, for his services. And in the latter case, it would be very questionable whether a recovery at law could be had, if it had all along been left to the town to make such compensation as they should deem reasonable after the services had been rendered. . . . The same principle has always been recognized in this State in regard to all officers. If no law of the State fixed their fees or pay, their services must be gratuitous." *Per Redfield, J.*, *Boyden v. Brookline*, 8 Vt. 284 (1836). But the decision (in *Boyden v. Brookline*, 8 Vt. 284) does not extend strictly beyond *official* services; and when a town agent, acting for the town, or the town itself, employs an attorney at law to prosecute or defend suits against the town, the latter is liable for the services. And the rule is the same if the "town agent," being an attorney, renders for the town professional services, in suits which the proper authorities of the town directed to be instituted. *Langdon v. Castleton*, 30 Vt. 285 (1858); *City of Central v. Sears*, 2 Col. 588; *Locke v. Central City*, 4 Col. 65. A provision that a *city marshal* shall have the same duties, responsibilities, and fees as sheriffs does not import that he may recover from the *county* in which the city is located for services rendered in the

administration of the criminal law. *Christ v. Polk County*, 48 Iowa, 302. A municipal officer is presumed to know the city ordinances and orders which fix his salary, and his acceptance of the amount so fixed will estop him from claiming more. *Galbreath v. Moberly*, 80 Mo. 484; *Rau v. Little Rock*, 34 Ark. 303. As to estoppel by acceptance see also *Hobbs v. Yonkers*, 102 N. Y. 13; *McInery v. Galveston*, 58 Tex. 334.

<sup>1</sup> *Commonwealth v. Bacon*, 6 Serg. & Rawle (Pa.), 322 (1820); followed, *Baker v. Pittsburgh*, 4 Pa. St. 49 (1846) (abolishing annual salary of collector of tolls); also, approved, *University v. Walden*, 15 Ala. 655 (1849); but distinguished, *Carr v. St. Louis*, 9 Mo. 190; *Comw. v. Mann*, 5 W. & S. (Pa.) 418; *Smith v. County*, 2 Pa. (Pa.) 293; *Madison v. Kelso*, 32 Ind. 79; *Warner v. People*, 2 Denio (N. Y.), 272; *Conner v. Mayor, &c. of New York*, 1 Seld. (5 N. Y.) 285, 296; *Augusta v. Sweeny*, 44 Ga. 463; *Brazil v. McBride*, 69 Ind. 244; *Des Moines v. Hillis*, 55 Iowa, 643; *Marden v. Portsmouth*, 59 N. H. 18. Under special circumstances, — *Held*, that the salary of a city officer could be diminished by the council. *Cox v. Burlington*, 43 Iowa, 612 (1876). A legislature may authorize the reduction of the salary of a city officer during his term. *Love v. Jersey City*, 40 N. J. L. 456. A statutory provision that "the compensation or salary of any officer shall be fixed before his appointment" does not require that it be fixed before every new appointment; it is sufficiently complied with when the salary is once fixed. *People v. Crissey*, 91 N. Y. 616. A statute or city

§ 232 (171). **Same subject. Exception to Rule resting on Contract.** — But where the services to be performed are *professional or private, rather than public or official*, an employment under an ordinance for a fixed time, at a fixed sum for the period, has been held to be a *contract*, and not subject to be impaired by the corporation. Thus the appointment or election by a city council, for a *fixed and definite* period, of a city officer, — for example, a *city engineer*, for one year, at the rate of one thousand dollars per year, — if accepted by him, constitutes, in the opinion of the Supreme Court of Massachusetts, a contract between him and the city; and the city, in such a case, has no authority, unless expressly conferred, to abolish or shorten the term of office, so as to deprive the officer, without his consent, of the right to compensation for the full period, unless for misbehavior or unfitness to discharge the duties of the place.<sup>1</sup>

ordinance fixing the amount of the salary of a city officer is not in the nature of a contract. *Love v. Jersey City*, 40 N. J. L. 456. Such officer, by continuing in office and receiving warrants for monthly payments of his salary during the term, waives all objections to the reduction. *Ib.* In an action against a city treasurer, on his official bond, for moneys received by him, he cannot charge commissions for the whole term at the rate allowed by law at his accession to office, when his compensation has been changed to a lower rate subsequently. *Iowa City v. Foster*, 10 Iowa, 189. Where a police judge agreed to accept the compensation fixed by the city council in payment of his services, if the council would by a change of ordinance provide compensation for the clerk of the court, — *Held*, that the agreement was based on a valid consideration; but that in cases where judgment was rendered against the city before such change, no fees could be recovered. *Crane v. Des Moines*, 47 Iowa, 105; *supra*, sec. 212. In *Commonwealth v. Bacon*, *supra*, it was held that an ordinance which reduced the salary of the mayor after the commencement of his term was valid. The court said, "This cannot be considered in the nature of a hiring for a year, because it was not obligatory on the mayor to serve out the year." Though an ordinance may fix term and compensation of officer, *the office may be abolished*, if its abolition be not forbidden, or salary reduced. There

is no contract between corporation and officer that the service shall continue, or the salary not be changed. *Waldraven v. Memphis*, 4 Coldw. (Tenn.) 431 (1867); *Hoboken v. Gear*, 3 Dutch. (N. J.) 265 (1859). The power to abolish municipal offices was reaffirmed, citing text, in *Butcher v. Camden* (fire marshal of city), 29 N. J. Eq. (2 Stew.) 478 (1878). General power to a corporation to fix the compensation of its officers does not authorize it to take away the fees of an officer, which are *specifically* fixed by the same charter. *Carr v. St. Louis*, 9 Mo. 190 (1845). The legislature may provide that the salary of an officer may be fixed by one board, *e. g.*, a common council, though it is payable by another, *e. g.*, a county, or board of supervisors; and in that case, the latter have no authority to change it when once fixed. *People v. Auditors of Wayne*, 13 Mich. 238; *People v. Wayne Co. Auditors*, 41 Mich. 4. Where by the general law the compensation of the mayor, which was specified, could be changed by ordinance "*but not during his term of office*," an ordinance providing that "after the expiration of the term of the present mayor of the city, the mayor shall serve without compensation" was held to be *ultra vires* and void, on the ground that a power to change the salary was not a power to abolish it altogether. *State, ex rel. v. Nashville*, 15 Lea (Tenn.), 697.

<sup>1</sup> *Chase v. Lowell*, 7 Gray (Mass.), 33 (1856); and see *Caverley v. Lowell*, 1

§ 233 (172). **Extra Compensation.**—It is a well-settled rule that a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary. He *cannot legally claim additional compensation* for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties within the scope of the *charter powers* pertaining to the office are increased and not his salary.<sup>1</sup> Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may properly be attached to an office to lay the foundation for extra compensation, would introduce intolerable mischief. The rule, too, should be rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not, be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse.<sup>2</sup>

Allen (Mass.), 289 (1861), as to ordinance constituting a contract with city attorney. These cases, if really distinguishable from the others, should not, it is believed, be extended, but the principle limited to instances where the services are not essentially official in their nature, and where the officer or other party is bound to serve for the fixed and definite period. Appointment of *police officer for a year*, held not to create a contract, and he was removable, without cause, within that period. *Chicago v. Edwards*, 58 Ill. 252 (1871).

A resolution of the council empowering an individual to collect the taxes due the city, at a given rate per cent on the amount collected for his compensation, may be repealed or modified at any time by the corporation, on the sole condition that it shall be liable for any compensation earned under the resolution previous to its repeal or modification. *Hiestand v. New Orleans*, 14 La. An. 330 (1859). The court did not regard the resolution as creating a contract, or, if so, it was one of mandate, revocable at the will of the principal. *Id.*

<sup>1</sup> *Ante*, sec. 216. Though the duties of a municipal officer may be increased by a city council, it has no power to confer upon another officer the duties, powers, and rights appertaining to his office *by statute*. So, a treasurer duly appointed and qualified, whose duty it was by law to receive and pay out the money belonging to a city, was held to be entitled to commissions upon the proceeds of bonds sold by the mayor under authority of the council. *Beard v. Decatur*, 64 Tex. 7.

<sup>2</sup> *Per Potts, J.*, in Court of Errors and Appeals, *Evans v. Trenton*, 4 Zab. (24 N. J. L.) 766 (1853); *ante*, sec. 216. The text cited and approved in *Decatur v. Vermillion*, 77 Ill. 315 (1875). See, also, *Andrews v. United States*, 2 Story C. C. 202; *Palmer v. The Mayor, &c. of New York*, 2 Sandford (N. Y.) 318; *Bussier v. Pray*, 7 Serg. & Rawle (Pa.) 447; *Angell & Ames on Corp.* sec. 317; *Gilmore v. Lewis*, 12 Ohio, 281; *Detroit v. Redfield*, 19 Mich. 376; *Sidway v. South Park Commissioners*, 120 Ill. 496. A salaried officer cannot sue the city for a balance of salary due unless there has been some default on the part of the city in making the

§ 234 (173). **Same subject.**—Not only has an officer, under such circumstances, no legal claim for extra compensation, but a *promise to pay him an extra fee or sum beyond that fixed by law is not binding*, though he renders services and exercises a degree of diligence greater than could legally have been required of him.<sup>1</sup>

necessary appropriations. *Waterman v. New York*, 7 Daly (N. Y.), 489. It has been held in *Pennsylvania* that where an officer's compensation is *fixed by statute* he cannot recover extra compensation for *expenses* incurred in performing his duties, even when the custom had been for a long time that the corporation should bear them. *Albright v. County of Bedford*, 106 Pa. St. 582.

A *salaried* officer of a public corporation has no claim for compensation *extra* his salary, on the ground that the duties of his office have been increased, or new duties added since the salary was fixed. *People v. Supervisors*, 1 Hill (N. Y.), 362; *Wendell v. Brooklyn*, 29 Barb. (N. Y.) 204; *Palmer v. Mayor, &c. of New York*, 2 Sandf. (N. Y.) 318; *ante*, sec. 216; *Covington v. Mayberry*, 9 Bush (Ky.), 304; *Andrews v. Pratt* (compensation for sale of county's railroad stock), 44 Cal. 309 (1872). Special instances, where a claim for compensation, in the absence of express provision, has been sustained, where the law has required a public officer to perform a duty, attended with trouble and expense, clearly *outside* of his regular official duties, see *People v. Supervisors*, 12 Wend. (N. Y.) 257; *Bright v. Supervisors*, 18 Johns. (N. Y.) 242; *Mallory v. Supervisors*, 2 Cowen (N. Y.), 531; *Ib.* 533; *Detroit v. Redfield*, 19 Mich. 376 (1869); *McBride v. Detroit*, 47 Mich. 236; s. c. 49 Mich. 239. If a county attorney goes beyond the limits of his county, at the instance and with the consent of the county board, he may recover reasonable compensation in addition to his salary. *Huffman v. Greenwood Co.*, 23 Kan. 281; *Butler v. Neosho Co.*, 15 Kan. 178; *Leavenworth Co. v. Brewer*, 9 Kan. 307. This subject is discussed in *White v. Polk Co.*, 17 Iowa, 413; *post*, sec. 479.

Where salary is *fixed by ordinance*, it cannot be changed by a committee or individual members of the corporation; nor will their promise to pay extra compensa-

tion for the duties of the office be binding on the corporation. But for services performed by request, not part of the duties of his office, and which could as appropriately have been performed by any other person, such officer may, in proper cases, recover a just remuneration. *Evans v. Trenton*, 4 Zab. (24 N. J. L.) 764 (1853); s. p. *Detroit v. Redfield*, 19 Mich. 376 (1869); *Converse v. United States*, 21 How. 463. For services required by ordinances, the city attorney is entitled to the compensation fixed by ordinance, and no other; and the mayor, by virtue of his duty to see that the "ordinances are duly enforced," cannot bind the corporation to pay more than the fixed salary or compensation, and this duty does not authorize that officer to employ assistant or independent counsel in any case, at the expense of the corporation. *Carroll v. St. Louis*, 12 Mo. 44 (1849); *Memphis v. Brown*, 20 Wall. 289, 321 (1873); *post*, sec. 479. Further, as to liability of city to attorneys, see the chapter on Contracts.

<sup>1</sup> *Heslep v. Sacramento*, 2 Cal. 580 (vote of \$10,000 to mayor for meritorious services, held void); *Hatch v. Mann*, 15 Wend. (N. Y.) 44; reversing, s. c. 9 *Ib.* 262; approved, *Palmer v. Mayor, &c. of New York*, 2 Sandf. (N. Y.) 318; *Batho v. Salter, Latch*, 54; *W. Jones*, 65; s. c. *Lane v. Sewell*, 1 Chitty, 175; *Ib.* 295; *Morris v. Burdett*, 1 Camp. 218; 3 *Ib.* 374; *Callaghan v. Hallett*, 1 Caines (N. Y.), 104; s. c. Col. & C. Cas. 179; *Preston v. Bacon*, 4 Conn. 471; *Shattuck v. Woods*, 1 Pick. (Mass.) 175; *Bussier v. Pray*, 7 Serg. & Rawle (Pa.), 447; *Carroll v. Tyler*, 2 Har. & Gill, 54; *Smith v. Smith*, 1 Bailey (S. C.), 70; *Debolt v. Cincinnati*, 7 Ohio St. 237; *Pilie v. New Orleans*, 19 La. An. 274. Payments received by one, knowing the agent to be unauthorized to make them, may be recovered by the principal as money wrongfully had and received. The people are

§ 235 (174). **Liability of Corporation to the Officer; Right of Officer to Salary.** — Where an officer of a municipal corporation, elected by the people for a specified term, is *improperly removed by the city council*, he may sue the corporation for his salary and perquisites for the time intervening between his removal and the expiration of his term.<sup>1</sup> It is a defence to the corporation that the officer *was legally removed*; but if he was removed contrary to law, it is no answer to the action that the corporation, in making the removal, acted judicially, and therefore is not liable for the error it committed.<sup>2</sup>

not bound by acts of a township committee, *ultra vires*, sanctioning unlawful payments to a collector. *Demarest v. New Barbadoes*, 40 N. J. L. 604. The principle in the text operates to deprive a public officer, or an officer of a municipal corporation, of a *claim for a reward* offered for a service which is embraced in his official or legal duties. *Gilmore v. Lewis*, 12 Ohio, 281, where a constable who arrested a thief was held not entitled to a reward offered by the defendant; *s. p.* *Pool v. Boston*, 5 Cush. (Mass.) 219; the doctrine of the text approved. *Decatur v. Vermillion*, 77 Ill. 315; *Matter of Russel*, 51 Conn. 577. Where a *fireman* employed as such by a city brought suit for a reward offered by a husband for the rescue of the dead body of his wife from a burning building, it was held that, as it was *not his duty to rescue a person from a burning building at the imminent peril of his own life*, the rescue could not be said to be in the line of his duty so as to preclude him from claiming the reward. *Reif v. Paige*, 55 Wis. 496. Where a person before being appointed city treasurer agreed in writing to repay to the city all fees, &c., in excess of \$2,000, and the council failed to fix his compensation, it was held that, while the agreement was invalid, he was estopped, by having rendered and settled his accounts, from claiming more than the \$2,000. *Hobbs v. Yonkers*, 102 N. Y. 13. A promise by a candidate to serve without compensation will not estop him from claiming his salary. *State, ex rel. v. Nashville*, 15 Lea, 697. See *ante*, chap. vi. sec. 139.

<sup>1</sup> *Stadler v. Detroit*, 13 Mich. 346 (1865); *Shaw v. Mayor, &c.*, 19 Ga. 468

(1856). The court, in considering the *rule of damages* in such a case, holds that the officer cannot recover of the corporation counsel fees for defending himself against the charges preferred against him, but may recover such "damages as necessarily resulted from his amotion from office, viz., his salary and perquisites." 19 Ga. 468, *supra*. But the corporation, it is suggested, may recoup the same as individuals who improperly dismiss servants employed for a determinate period. 2 Greenl. Ev. sec. 261 *a*. But see *United States v. Addison*, 6 Wall. 291; *Hoke v. Henderson*, 4 Dev. (N. C.) 1. That the corporation cannot thus reduce the amount of recovery, see cases cited in the notes to this section. An action against a city to recover salary cannot be maintained, while the office is occupied by a *de facto* officer, or until the right to the office has been adjudicated. *Selby v. Portland*, 14 Oreg. 243; *supra*, sec. 230, note; *post*, sec. 276.

<sup>2</sup> *Shaw v. Mayor, &c.*, 19 Ga. 468 (1856); *Shaw v. Mayor, &c.*, 21 Ga. 280; see *s. c.* *Mayor, &c. v. Shaw's Administrator*, 25 Ga. 590. In the case last cited it was decided that if the removal of a city officer be for a specified cause, not warranting the removal, and the officer sue the corporation for his salary, as a defence to such action it may aver and prove other matters, good in law, to justify such removal. In thus holding, the court say: "If his term of office had not expired when this suit was instituted, and he had moved for a *mandamus* to restore him, instead of bringing an action for his salary, the court would not have interfered, if good cause for his removal could have been shown, although he may have

§ 236 (175). **Liability of the Officer to the Corporation and to Others.** — *Public officers* (as distinguished from *corporate officers*),

been removed without notice. *Rex v. Mayor, &c.*, 2 Cowp. 523; *The King v. The Mayor, &c.*, 2 Term R. 182." — *per McDonald, J.*; 25 Ga. 590, 592. See *Hoboken v. Gear*, 3 Dutch. (N. J.) 265. Aldermen held not to be individually liable for passing an unauthorized ordinance depriving a mayor of his office. *Jones v. Loring*, 55 Miss. 109; *infra*, sec. 237, note. An incumbent was appointed by the aldermen and removed by the mayor, who nominated a successor; the incumbent's salary did not cease until his successor was confirmed. *White v. Mayor, &c. of New York*, 4 E. D. Smith, 563 (1855). A person is not entitled to the salary of a public office unless he *both obtains and exercises the office*. *Farrell v. Bridgeport*, 45 Conn. 191. Thus, a city treasurer, being indicted for forgery, the mayor and council elected another in his stead for the balance of his term. Upon his acquittal, — *Held*, that he could not recover the salary for such balance of his term. If the prosecution was malicious, he could recover in tort from the wrongdoer. *Brunswick v. Fahm*, 60 Ga. 109. So a policeman who has been found guilty of immoral conduct and discharged from his office by a board of police commissioners having jurisdiction, cannot recover from the city his salary for the remainder of his term. It makes no difference that the commissioners may have erred in their judgment on the evidence, no appeal having been taken. *Queen v. Atlanta*, 59 Ga. 318. By charter, the power to appoint policemen was conferred on a board of police, composed of the mayor and recorders, and this board was authorized to discharge policemen, for cause, and to: "decide on all police matters pertaining to appointments, dismissals, &c., finally and without appeal." In an action for wages, brought against the city by a policeman, who claimed that he had been appointed for a year, and dismissed at the end of a month, without good cause, the Supreme Court decided that the board having dismissed the plaintiff for what it deemed sufficient cause, its decision was final, and the sufficiency of

the cause of dismissal was not inquirable into in the action. *Nolan v. New Orleans*, 10 La. An. 106 (1855). *Ante*, sec. 200.

Declaring an office and the prospective fees of the officer not to be property, and that the right to fees grows out of *services performed*, it was decided by the Court of Appeals that a municipal officer who had been kept out of his office, and had not performed its duties, could not maintain an action against the city to recover the amount of fees accruing from the office. *Smith v. New York*, 37 N. Y. 518 (1868); *Saline Co. v. Anderson*, 20 Kan. 298; *Dolan v. Mayor*, 68 N. Y. 279; *Hadley v. Mayor*, 33 N. Y. 603, 607, *per Denio*, C. J. In a later New York case the court reviewed the previous decisions, and held that the payment of the fees or salary provided by law, to an officer *de facto* for services rendered before a judgment of *ouster*, will protect a municipality against the claim of the officer *de jure* for the same compensation; but after the judgment, the compensation for services rendered, which has not been paid, may be recovered by the officer *de jure*. *McVeany v. New York*, 80 N. Y. 185; *Steubenville v. Culp*, 38 Ohio St. 18. See *Benoit v. Wayne County*, 20 Mich. 176, *Cooley, J.*, dissenting. It has, however, several times been decided in California that the salary annexed to a public office is *incident to the title* to the office, and not to its occupancy and exercise, and that the right to compensation is not affected by the fact that an usurper, officer *de facto*, has discharged the duties of the office. *Dorsey v. Smith*, 28 Cal. 21; *Stratton v. Oulton*, *Ib.* 44; *Carroll v. Siebenthaler*, 37 Cal. 193 (1869); approved, *Meagher v. County*, 5 Nev. 244 (1869); where a city physician, who was duly elected, but kept out of his office by the prior incumbent, who drew the salary for some months, was permitted to collect his back salary from the city. *Memphis v. Woodward*, 12 Heisk. 499. An officer *unlawfully deprived of his office* may maintain an action *against the intruder for damages*; in such case the measure of damages is generally the salary or fees re-

elected pursuant to statute by a municipal corporation, *are not the servants or agents of the corporation* in such a sense as will enable the corporation, in the absence of a statute giving the remedy, to

received by the intruder. *Nichols v. McLean*, 101 N. Y. 526; *People v. Nolan*, 102 N. Y. 539. "The salary follows the legal title." *Libbey, J.*, in *Andrews v. Portland*, 79 Me. 484 (holding also that in an action by an officer *de jure* for his salary during the time of his unlawful removal from office, the city is not entitled to have deducted from the sum due the amount earned by him in other ways during that time. To same effect is *Fitzsimmons v. Brooklyn*, 102 N. Y. 536). See, further, *ante*, secs. 215, note; 230, note; *People v. Miller*, 24 Mich. 458 (1872); *Benoit v. Wayne County*, *supra*; *Philadelphia v. Given*, 60 Pa. St. 136, *per Thompson, C. J.* Right of municipal officer to retain his salary in his own hands, denied, where it was his duty to pay all sums received into the treasury. *New Orleans v. Finnerty*, 27 La. An. 681 (1875); s. c. 21 Am. Rep. 569, referred to *infra*, note.

The legal incumbent of a municipal office rendering service is entitled to compensation until he has actual notice of his removal. *Jarvis v. Mayor, &c. of New York*, 2 N. Y. Leg. Obs. 396. Equity will not ordinarily enjoin the payment of the salary to the incumbent pending a contest; the bill must show grounds for equitable relief. *Colton v. Price*, 50 Ala. 424 (1874); *Bruner v. Bryan* (against interloper), 50 Ala. 523 (1874); *Field v. Commonwealth*, 32 Pa. St. 478 (1849); *Ramshay, In re*, 83 Eng. C. L. 174 (1852); *Hennen, In re*, 13 Pet. 230; *Queen v. Governors, &c.*, 8 Ad. & El. 632; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Bowerbank v. Morris*, Wall. C. C. R. 118. In *The City v. Given*, 60 Pa. St. 136, the plaintiff acted as city commissioner for some months, when it was decided that he had not been duly elected, and in a suit brought for his salary, it was held that he could not recover, because he had not qualified by giving security. See, *ante*, sec. 214, note. In an action by the rightful officer on a *supersedeas bond* given in a *quo warranto* proceeding by an intruder,

the measure of damages is the full amount of the salary (where the office has a fixed salary) received by the intruder pending the operation of the *supersedeas*. *United States v. Addison*, 6 Wall. 291. See *People v. Miller*, 24 Mich. 458 (1872).

"It is a grave question," says *Seymour, C. J.*, "whether a merely *de facto* officer, even when he actually performs the whole duties of the office, can enforce the payment of the salary. The authorities seem to be that he cannot. *State v. Carrol*, 38 Conn. 471; *Riddle v. Bedford County*, 7 Serg. & Rawle (Pa.), 386; *Bently v. Phelps*, 27 Barb. (N. Y.) 524; *People v. Tieman*, 30 Barb. (N. Y.) 193. However this may be, it is clear, we think, that the salary of an officer is not due to parties who are neither officers *de jure*, nor *de facto*." *Samis v. King*, 40 Conn. 298 (1873).

Respecting liability of an intruder to the officer *de jure* for salary and fees received, and when an action will lie for money had and received, *Glascock v. Lyons*, 20 Ind. 1; *Douglas v. State*, 31 Ind. 429; *Dorsey v. Smythe*, 28 Cal. 21; *Stratton v. Oulton*, *Id.* 44; *City v. Given*, 60 Pa. St. 136; *Allen v. McKean*, 1 Sumn. 276; *State v. Sherwood*, 42 Mo. 179; *Hunter v. Chandler*, 45 Mo. 452; s. c. 10 Am. Law Reg. (N. S.) 440, and note; *Boyter v. Dodsworth*, 6 Term R. 681; *Sadler v. Evans*, 4 Burr. 1984; *People v. Miller*, 24 Mich. 458; *Nichols v. McLean*, 101 N. Y. 526; *People v. Nolan*, 102 N. Y. 539. The right of *set-off* in respect of his salary was denied to a municipal officer where it was the duty of the officer to deposit all moneys received in the treasury, and where it was provided his salary was to be paid in a specific manner. The decisions of the Supreme Court of the United States, allowing equitable *set-off* in such cases, were distinguished. *New Orleans v. Finnerty*, 27 La. An. 681 (1875); s. c. 21 Am. Rep. 569. If the city is liable at once to suit by the officer, why deny the right of *set-off*?

maintain *actions against such officers* for negligence in the discharge of their official duty. This principle does not, it is believed, apply where the corporation is injured by the negligence of *its own officers*; but even in such case the recovery in the absence of statute can only be for want of fidelity and integrity, not for honest mistakes.<sup>1</sup> To protect the public, however, *officers are usually required to give bonds*, in which case they are of course liable, as we have seen, according to the conditions thereof.<sup>2</sup> They are also liable on common-law principles to individuals who sustain special damage from the failure to perform imperative and ministerial duties.<sup>3</sup>

§ 237 (176). **Same subject.** — In this country the *officers of municipal corporations are*, in many respects, *public officers*, being charged by legislative enactment with duties which concern both the corporation and the public at large. The duties and liabilities of such officers to the corporation fall within the scope of this treatise, and have been considered. But their *individual rights and their duty and liability to others*, upon contracts and for torts, are not, strictly speaking, embraced in the plan of the work. They are, however, so germane to it, and reflect so much light upon the subjects which are herein treated, that it has been thought that a brief reference to some of the more important rules and adjudications was desirable, and this has accordingly been made in the note.<sup>4</sup>

<sup>1</sup> Parish in *Sherburne v. Fiske*, 8 Cush. (Mass.) 264, 266 (1851), opinion by Dewey, J.; cites *White v. Philipson*, 10 Met. (Mass.) 108; *Trafton v. Alfred*, 3 Shepl. (15 Me.) 258; *Kendall v. Stokes*, 3 How. 87; *Commonwealth v. Genther*, 17 Serg. & Rawle (Pa.), 185; *Wilson v. Mayor, &c. of New York*, 1 Denio (N. Y.), 595; *Hancock v. Hazzard*, 12 Cush. (Mass.) 112; *Lincoln v. Chapin*, 132 Mass. 470; *Minor v. Bank*, 1 Pet. (U. S.) 46, 69. Where a surveyor of highways has, by law, a discretion as to the kind of repairs, and exercises his best judgment and acts in good faith, the corporation for which he acts is bound, and cannot defeat his recovery for the price of materials furnished, by evidence to show that the repairs were not, in fact, necessary. But it would be otherwise if fraud or corruption were shown. *Palmer v. Carroll*, 4 Fost. (24 N. H.) 314 (1851). See, also, *People v. Lewis*, 7 Johns. (N. Y.) 73; *Seaman v. Patten*, 2 Caines (N. Y.), 312. In an action against county supervisors to re-

cover money illegally allowed for claims, the complaint should aver the nature of the claims: it should be brought by the legal officer of the county, but if by a taxpayer, the complaint should allege facts showing the officer's neglect or refusal to act. *Hedges v. Dam*, 72 Cal. 520.

*Personal liability of municipal councilors* to the corporation for misappropriation of its funds; see *Municipality of East Nissouri v. Horseman*, 16 Upper Can. Q. B. 588; of treasurer for paying money on an illegal order or resolution. *Daniels v. Burford*, 10 Upper Can. Q. B. 481.

<sup>2</sup> *Supra*, secs. 214-216.

<sup>3</sup> *Infra*, sec. 237, note and cases; *post*, chap. xxiii.

<sup>4</sup> **SUITS BY PUBLIC OFFICERS.** — *Public officers* have, in general, a power to sue commensurate with their duties. If officers of a corporate body, suit should be brought *in the name of the corporation*, unless the statute direct otherwise. *Shook v. State*, 6 Ind. 113; *State v. Rush*, 7 Ind. 221; *Supervisors v. Stimpson*, 4 Hill



§ 238 (177). **Amotion and Disfranchisement; the two distinguished; English decisions as to Disfranchisement inapplicable in this country.**—The elementary works treat of Amotion and Dis-

(N. Y.), 136, and cases cited; *Todd v. Birdsall*, 1 Cow. (N. Y.) 260, and cases cited in note; *Jansen v. Ostrander*, 1 Cow. (N. Y.) 670; *Cornell v. Guilford*, 1 Denio, (N. Y.) 510; compare *Commissioners v. Perry*, 5 Ohio, 57; *Barney v. Bush*, 9 Ala. 345; *VanKeuren v. Johnson*, 3 Denio, 182; *Tecumseh v. Phillips*, 5 Neb. 305 (1877); *Regents of State University v. McConnell*, 5 Neb. 423 (1877). But it has been held that a public officer cannot, without the aid of a statute, maintain a suit in his own name, although he may have taken a note or contract to himself individually, if the consideration for such a note or contract be a liability to the State. The ground of this rule is public policy, — to discourage public officers from transacting in their own name the business of the public. *Hunter v. Field*, 20 Ohio, 340 (1851); *Irish v. Webster*, 5 Greenl. (Me.) 171; *Gilmore v. Pope*, 5 Mass. 491. If the obligation is taken to the officer as agent, or in his official capacity, the action is properly brought in the name of the government beneficially interested. *Dugan v. United States*, 3 Wheat. 172; s. p. *United States v. Boice*, 2 McLean, 352; *United States v. Barker*, 2 Paine C. Ct. 152; 2 Parsons on Notes and Bills, 451, and other cases cited. An action by a public officer does not *abate* by the expiration of his term of office. The suit may be continued in his name until its termination, or, by the practice in many of the States, his successor may be substituted. *Kellar v. Savage*, 20 Me. 199 (1841); *Todd v. Birdsall*, 1 Cow. (N. Y.) 260; *Haynes v. Covington*, 13 Sm. & Mar. (21 Miss.) 408; *Grant v. Fancher*, 5 Cow. (N. Y.) 309; *Colgrove v. Breed*, 2 Denio (N. Y.), 125; *Manchester v. Herrington*, 10 N. Y. 164; *Upton v. Starr*, 3 Ind. 538; *Denver v. Dean*, 10 Col. 375. Officers cannot be impleaded as individuals for acts done in the exercise of their corporate powers. *Smith v. Stephan*, 66 Md. 381 (injunction against officers, as individuals, to restrain them from issuing funding bonds, as authorized by law, denied).

**EVIDENCE; PROOF OF TITLE OR OFFICIAL CHARACTER; ACTS AND DECLARATIONS; RES GESTÆ.**—Where the authority of an officer of a public corporation comes incidentally in question in an action in which he is not a party, it is sufficient to show that he was an acting officer, and the regularity of his appointment or election cannot be made a question. *Proof that he is an acting officer is prima facie evidence* of his election or appointment, as well as of his having duly qualified. But if he relies alone on proof of a due election or appointment, such election or appointment must be legally established. *Pierce v. Richardson*, 37 N. H. 306 (1858); *Tucker v. Aiken*, 7 N. H. 113; *Johnson v. Wilson*, 2 N. H. 202; *Baker v. Shephard*, 4 Fost. (24 N. H.) 212 (1851), and cases cited; *Bean v. Thompson*, 19 N. H. 290; *Blake v. Sturdevant*, 12 N. H. 573; *Burgess v. Pue*, 2 Gill (Md.), 254. *Ante*, sec. 213. An officer, even when justifying may *prima facie* establish his official character by proof of general reputation, and that he acted as such officer. *Johnson v. Steadman*, 3 Ohio, 94; followed, *Eldred v. Seaton*, 5 Ohio, 215; *Berryman v. Wise*, 4 Term R. 366; *Potter v. Luther*, 3 Johns. 431; *Wilcox v. Smith*, 5 Wend. 233; *People v. McKinney*, 10 Mich. 54. But it is not enough to show that the officer was acting officially in the particular instance in controversy in the case upon trial, and in which his authority is questioned. *Hall v. Manchester*, 39 N. H. 295 (1859). "The mere acting in a public capacity is sufficient *prima facie* proof of proper appointment; but it is only *prima facie* presumption and is capable of being rebutted." *Per Lord Coleridge*, C. J., in *Regina v. Roberts*, 36 Law Times Rep. 690 (1878); s. c. 6 Am. Law Rep. 414. *Post*, sec. 276, note. An acting officer is estopped to dispute the validity of his own appointment and election. *State v. Sellers*, 7 Rich. Law, 368; *State v. Mayberry*, 3 Strob. 144.

**ACTS AND DECLARATIONS** of officers, when evidence for or against the corpo-

franchisement together: indeed, formerly, the important distinction between the two was not observed. Amotion relates alone to *affi-*

ration. *Mitchell v. Rockland*, 41 Me. 363; *Jordan v. School District*, 38 Me. 164 (1864); *Morrell v. Dixfield*, 30 Me. 157; *County v. Simmons*, 5 Gilm. (10 Ill.) 516; *Railroad Co. v. Ingles*, 15 B. Mon. (Ky.) 637; *Glidden v. Unity*, 33 N. H. 577; *Toll Co. v. Bettsworth*, 30 Conn. 380; *Barnes v. Pennell*, 2 H. of L. Cas. 497; *Curnen v. New York*, 79 N. Y. 511. See chapter on Corporate Records and Documents, *post*. The acts of the officers of municipal corporations in the line of their official duty, and within the scope of their authority, are binding upon the body they represent; and *declarations* and *admissions* accompanying such acts as part of the *res gestæ*, calculated to explain and unfold their character, and not narrative of past transactions, are competent evidence against the corporation. To render such declarations and admissions evidence, they must accompany acts, which acts must be of a nature to bind the corporate body. *Glidden v. Unity*, 33 N. H. 571 (1856); *Perkins v. Railroad Co.*, 44 N. H. 223; *Grimes v. Keene*, 52 N. H. 330; *Harpwell v. Phippsburg*, 29 Me. 313; *Coffin v. Plymouth*, 49 N. H. 173; *Hopkinton v. Springfield*, 12 N. H. 328; *Pittsfield v. Barnstead*, 40 N. H. 477; *Canaan v. Hanover*, 49 N. H. 415; *Gray v. Rolinsford*, 58 N. H. 253 (1878); s. c. 21 Alb. L. Jour. 76. "A municipal corporation may be estopped by the action of its proper officers, when the corporation is acting in its private, as contradistinguished from its governmental, capacity, and has lawful power to do the act." *Per Scholfield, J.*, *Chicago v. Sexton*, 115 Ill. 230.

**NOTICE TO OFFICERS.** — Where the officers or agents of a public corporation have no powers or duties with respect to a given matter, their individual knowledge, or the individual knowledge of the inhabitants or voters, does not bind or affect the corporation. *Harrington v. School District*, 30 Vt. 155 (1858); *Angell & Ames Corp.* sec. 239; *Hayden v. Turnpike Co.* 10 Mass. 397. The mayor is chief executive officer of the city, and notice to him of a nuisance is sufficient, when it would not be to the clerk, who is only a recording

officer, not authorized to act upon the notice. *Nichols v. Boston*, 98 Mass. 39 (1867); *ante*, secs. 208, 209; *post*, chap. xxiii. Index, title *Notice*.

**INDICTMENT OF PUBLIC AND CORPORATE OFFICERS.** — "A public officer," it is declared in North Carolina, "entrusted with definite powers to be exercised for the benefit of the community, who wickedly abuses or fraudulently exceeds them, is punishable by indictment." *State v. Glasgow*, N. C. Conf. R. 186, 187 (indictment of Secretary of State); *State v. Justices, &c.*, 4 Hawks (N. C.), 194 (when county authorities indictable for non-repair of jail); see *Paris v. People*, 27 Ill. 74; *State v. Comm'rs of Fayetteville* (non-repair of streets), 2 N. C. Law, 617; *Ib.* 633; 2 Murph. 371; *State v. Fishblate*, 83 N. C. 654; *State v. Hall*, 97 N. C. 474. But see as to street commissioner, *Grafins v. Commonwealth*, 3 Pa. (Penn. & W.) 502; *State v. Comm'rs, Walk.* (Miss.) 368. Indictment of municipal officers for violation of charter. *People v. Wood*, 4 Park. Cr. R. 144; *Hammar v. Covington*, 3 Met. (Ky.) 494; *State v. Shelbyville*, 4 Sneed (Tenn.), 176; *State v. Shields*, 8 Blackf. (Ind.) 151; *Lathrop v. State*, 6 Blackf. (Ind.) 502; *State v. Burlington*, 36 Vt. 521. *Requisites of indictment* for non-performance of official duty. *Wattles v. People*, 13 Mich. 446; *State v. Mayor*, 11 Humph. (Tenn.) 217; *State v. Comm'rs*, 4 Dev. (N. C.) 345; 3 Chitty Crim. Law, 586, 606, for precedents of indictments against corporations. *Criminal information* against municipal officers. *Willc. Corp.* 315-318; *Rex v. Watson*, 2 Term R. 204; *Ib.* 198. Indictment against *municipal corporations*. See chapter on Remedies against Illegal Corporate Acts, *post*, secs. 931, 933.

**LIABILITY OF OFFICER FOR MONEYS RECEIVED.** — A public or municipal officer, who is required to account for and pay over money that comes into his hands, is liable though it be stolen without his fault, unless relieved from this responsibility by statute. *Halbert v. State*, 22 Ind. 125 (1864); *Muzzy v. Shattuck*, 1 Denio, 233; *Morbeck v. State*, 23 Ind.

*cers*; disfranchisement, to *corporators or members* of the corporation. Amotion, therefore, is the removal of an officer in a corporation from

86; *Hancock v. Hazzard*, 12 Cush. (Mass.) 112; *Clay Co. v. Simonsen*, 1 Dak. Ter. 403; affirmed, *Clay County v. Simonsen*, 2 Dak. Ter. 112; *Egremont v. Benjamin*, 125 Mass. 15; *State v. Lewenthall*, 55 Miss. 589; *State v. Powell*, 67 Mo. 395; *State v. Gates*, 67 Mo. 139; *Inglis v. State*, 61 Ind. 212; *United States v. Prescott*, 3 How. (U. S.) 578; *Commonwealth v. Comly*, 4 Pa. St. 372; *State v. Harper*, 6 Ohio St. 707; *Henry v. State*, 98 Ind. 381. And a direction to a public officer (*e. g.* a county treasurer) how and where to keep the money (*e. g.* in a safe provided by the county), if made by a board or authority having no legal control or power over the matter, will not be a defence to such officer if the money is stolen from the safe. *Halbert v. State*, *supra*. In a suit against a tax-collector to recover money received by him, it is no defence that he received the money on account of taxes which the legislature had no constitutional power to impose. *Waters v. State*, 1 Gill (Md.), 302 (1843); *Thompson v. Stickney*, 6 Ala. 579; *Evans v. Trenton*, 4 Zab. (24 N. J. L.) 764. Treasurer held not entitled to credit for money paid contractors upon warrants not drawn according to the charter. *McCormick v. Bay City*, 23 Mich. 457.

#### LIABILITY OF OFFICER ON CONTRACTS.

— Public and municipal officers are *not personally liable on contracts* within the scope of their authority and line of duty, unless it is very apparent that they intended to bind themselves personally. *Macbeath v. Haldimand*, 1 D. & E. Term. 172, and *Hodgson v. Dexter*, 1 Cranch, 345, are the leading cases. The question is, To whom was the credit given? Did the defendant contract in his public or private capacity? See *Olney v. Wickes*, 18 Johns. (N. Y.) 122, where the promise was held not personal. Compare *King v. Butler*, 15 Johns. (N. Y.) 281; *Gill v. Brown*, 12 Johns. (N. Y.) 385; *Walker v. Swartout*, *Ib.* 444; *Mott v. Hicks*, 1 Cow. (N. Y.) 513; *Sheffield v. Watson*, 3 Caines (N. Y.), 69; commented on, 12 Johns. 448; *Brown v. Rundlett* (full discussion), 15 N. H. 360 (1844), and cases cited and criticised;

*Belknap v. Rheinhardt*, 2 Wend. (N. Y.) 375; *Adams v. Whittlessey*, 3 Conn. 560; 8 Conn. 329; *Hammaraskold v. Bull*, *et al.* ("State capitol commissioners") 11 Rich. (S. C.) Law, 493; *Lesley v. White*, 1 Speers, 31; *Young v. Commissioners of Roads*, 2 Nott & McC. 537; *Miller v. Ford*, 4 Rich. (S. C.) Law, 376; s. c. 4 Strob. 213; *Copes v. Mathews*, 10 Sm. & Marsh. (18 Miss.) 398; *Tucker v. Shorter*, 17 Ga. 620; *Woodbridge v. Hall*, 47 N. J. L. (18 Vroom) 388; *Hall v. Cockrell*, 28 Ala. 507 (1856); but *quære*, as to its correctness. In *Nickerson v. Dyer*, 105 Mass. 320, the *agents or committee of a town* were held not to be personally liable. A public officer contracting with a party who knows the extent of his authority is not personally liable, unless such intent is clearly expressed. *Broadwell v. Chapin*, 2 Ill. App. 511; *post*, chap. xiv. In the absence of a provision to the contrary, an officer of a municipal corporation is not disabled from entering into a contract with it. *Municipality v. Caldwell*, 3 Rob. (La.), 368 (1842). See on this point, *post*, sec. 292 and note. It is held that where the officers of a public or municipal corporation, acting officially and under an innocent mistake of the law, in which the other contracting party equally participated, with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers are *not, in such case, personally liable*, nor is the corporation liable. *Houston v. Clay County* (unauthorized contract by township trustees for the erection of a bridge), 18 Ind. 396 (1862); *Boardman v. Hayne*, 29 Iowa, 339 (1870); *Duncan v. Niles*, 32 Ill. 532 (1863), and cases cited; *Ogden v. Raymond*, 22 Conn. 379 (1853); *Dameron v. Irwin*, 8 Ire. Law (N. C.), 421 (1848); *Hite v. Goodman*, 1 Dev. & Bat. Eq. (N. C.) 364 (1836); *Ives v. Hulet*, 12 Vt. 314 (1840); *Stone v. Huggins*, 28 Vt. 617; *Tucker v. Justices*, 13 Ire. Law (N. C.) 434; *Dey v. Lee*, 4 Jones (Law), 238; *Tucker v. Shorter*, 17 Ga. 620; *Copes v. Mathews*, 10 Sm. & Marsh. (18 Miss.) 398; *Hall v. Cockrell*, 28 Ala. 507; compare *Potts v. Henderson*, 2 Ind.

his office, but it leaves him still a member of the corporation. Disfranchisement is to destroy or take away the franchise or right of

(Carter) 327 (1850); *Lyon v. Irish*, 58 Mich. 518. Liability under statute of trustees or directors of public works who make unauthorized contracts. *Higgins v. Livingstone*, 4 Dow, 341; *Parrott v. Eyre*, 10 Bing. 283; *Wilson v. Goodman*, 4 Hare, 54.

**TAX-COLLECTOR'S PERSONAL LIABILITY TO THIRD PERSONS.** — Tax-collector liable in trespass who seizes without color of law for tax assessment, or under an unconstitutional law. *McCoy v. Chillicothe*, 3 Ohio, 370; *Ragnet v. Wade*, 4 Ohio, 107; *Loomis v. Spencer*, 2 Paige, 150. But a collector whose warrant is in due form, with nothing on its face to show the illegality of the tax or the want of authority in the assessors or previous officers, will be protected in executing it, even though the tax be not lawfully assessed. *Chegary v. Jenkins*, 1 Seld. (5 N. Y.) 376 (1861); affirming s. c. 3 Sandf. Sup. Ct. R. 409; *Abbott v. Yost*, 2 Denio (N. Y.), 86; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170 (1830), leading case; *Downing v. Rugar*, 21 Wend. 178 (warrant of justice to overseers of poor); *Alexander v. Hoyt*, 7 Wend. (N. Y.) 89; *Clark v. Halleck*, 16 Wend. (N. Y.) 607; *People v. Warren*, 5 Hill (N. Y.), 440; *Webber v. Gray*, 24 Wend. (N. Y.) 485; *Loomis v. Spencer*, 2 Paige, 153; *Little v. Merritt*, 10 Pick. (Mass.) 547; see *Suydam v. Keys*, 13 Johns. (N. Y.) 444; *Gale v. Mead*, 2 Denio (N. Y.), 160; *Id.* 232; *Easton v. Callender*, 11 Wend. (N. Y.) 90; *Clark v. Norton*, 49 N. Y. 243. Liability of assessor. *Dorwin v. Strickland*, 57 N. Y. 492 (1877); *Harshman v. Winterbottom*, 123 U. S. 215.

**PERSONAL LIABILITY OF PUBLIC OFFICERS FOR ACTS OF SUBORDINATES; RESPONDEAT SUPERIOR.** — Public officers are not liable for the misconduct or malfeasance of such persons as they are *obliged* to employ; the reason here being that the maxim of *respondeat superior* has no application, there being no freedom of choice as to the selection and control of agents. *Bailey v. Mayor, &c.*, 3 Hill (N. Y.), 531 (1842); affirmed in error, 2 Denio, 433 (1845); *Hall v. Smith*, 2 Bing. 156; *Pritch-*

*ard v. Keefer*, 53 Ill. 117; *Humphreys v. Mears*, 1 Man. & Ryl. 187; *Bolton v. Crowther*, 4 Dowl. & Ryl. 195; *Harris v. Baker*, 4 Maule & Selw. 27; *Bachelor v. Pinkham*, 68 Me. 253. See also *Lane v. Cotton*, 1 Salk. 17; *Story on Agency*, 320 *et seq.*; *Story on Bail*, 300, 302; *Martin v. Mayor, &c.*, 1 Hill (N. Y.), 545, 551; *Mayor, &c. v. Furze*, 3 Hill (N. Y.), 612, 618. City liable for negligence in making public improvements, though it let the contract to a contractor who is to perform it under the supervision and direction of the city. *Chicago v. Dermody*, 61 Ill. 431; *Chicago v. Joney*, 60 Ill. 383. More fully on this point see *post*, chap. xxiii.; *Wright v. Hoebrook* (full discussion), 52 N. H. 120 (1872); s. c. 13 Am. Rep. 12.

**LIABILITY OF PUBLIC OFFICERS FOR ACTS JUDICIAL IN THEIR NATURE.** — Officers are *not liable* for honest errors or mistakes of judgment as to acts within the scope of their authority, *judicial* in their nature, in the absence of malice or corruption, or statute imposing the liability. *Post*, chaps. xxii. and xxiii.; *Ramsey v. Riley*, 13 Ohio, 157; *Steward v. Southard*, 17 Ohio, 402; *Conwell v. Emrie* (road supervisor), 4 Ind. 209; *Bartlett v. Crozier* (highway overseer), 17 Johns. (N. Y.) 439; *Freeman v. Cornwall* (highway overseer), 10 *Id.* 470; *McConnell v. Dewey* (road supervisor), 5 Neb. 385 (1877); *Johnson v. Stanley*, 1 Root (Conn.), 245; *Township v. Carey*, 3 Dutch. (N. J. L.) 377; *Waters v. Waterman*, 2 Root, 214; *Craig v. Burnett*, 32 Ala. 728; *State v. Dunnington*, 12 Md. 340; *Commissioners v. Nesbitt*, 11 Gill & J. (Md.) 50; *Woodruff v. Stewart*, 63 Ala. 206 (action against mayor acting as judge for false imprisonment). *East River Gas-Light Co. v. Donnelly*, 93 N. Y. 557. Liability where the officer's function is *quasi judicial*. *Wilkes v. Dinman*, 7 How. 89 (where the subject is much considered, and malice or wilful wrong held to be essential), *Waldron v. Berry*, 51 N. H. 136; *Perry v. Reynolds*, 53 Conn. 527; *Raymond v. Fish*, 51 Conn. 80 (health officer not liable for mere error of judgment);

being any longer a *member* of the corporation.<sup>1</sup> American municipal corporations are, in many respects, essentially different in their con-

Matter of Isaacson, 36 La. An. 56 (failure to levy a tax for payment of judgment). The members of a city council are not individually liable, in a civil or criminal action, for acts involving the exercise of discretion, unless they act corruptly. Walker v. Hallock, 32 Ind. 239 (1869); Baker v. State, 27 Ind. 485. Liability of *ministerial officer*, charged by statute with an absolute and certain duty. Clark v. Miller, 54 N. Y. 528, and cases cited. But see reference to this case, cited by Miller, J., in Dow v. Humbert, 91 U. S. 294, 302 (1875). *Public duty*, not ordinarily enforceable by private action against the officer, unless given by statute. Foster v. McKibben, 14 Pa. St. 168; McConnell v. Dewey (road supervisor), 5 Neb. 385 (1877). *Misapplication of public funds by officer*. Township, &c. v. Linn, 36 Pa. St. 431. *Ante*, secs. 214-216, notes. Neglect to take a bond required by law. Boggs v. Hamilton, 2 Const. (S. C.) R. 381; State v. Dunnington, 12 Md. 340. A municipal officer misled into issuing order, not liable to the holder. Boardman v. Hayne, 29 Iowa, 339.

PERSONAL LIABILITY OF OFFICER FOR TORTS. — Alvord v. Barrett (town clerk), 16 Wis. 175; American Print Works v. Lawrence, 3 Zab. (23 N. J. L.) 590, 601. *No liability* for acts done by a public officer under lawful authority and in a proper manner. *Ib.* Full discussion and cases cited by Carpenter, J.; s. p. in s. c. 1 Zab. (21 N. J. L.) 248, 260, *per Green, C. J.*; Calking v. Baldwin, 4 Wend. (N. Y.) 667; and cases cited. How far protected by an *unconstitutional* statute. *Ib.* But if officers *act maliciously, oppressively, corruptly, or without authority of law*, they may be held personally liable. Pruden v. Love, 67 Ga. 190 (declaring a building a nuisance and tearing it down without proper notice to the owner). Mc-

Carthy v. DeArmit, 99 Pa. St. 63 (unlawful arrest and imprisonment. See also as to measure of damages). Liability for *non-feasance* or *misfeasance*, where the duty is specific, imperative, and not judicial, in its nature. Griffith v. Follett, 20 Barb. (N. Y.) 630 (1855); Weaver v. Devendorf, 3 Denio (N. Y.), 117; Harmon v. Brotherson, 1 Denio (N. Y.), 537; *Ib.* 595; Adsit v. Brady, 4 Hill (N. Y.), 630 (1843). "It is settled in this court that one who assumes the duties and is invested with the powers of a public officer is *liable to an individual who sustains special damage* by a neglect properly to perform such duties." Finch, J., in Bennett v. Whitney, 94 N. Y. 302 (leaving a temporary opening in a street unguarded and unlighted). Hoover v. Barkhoof, 44 N. Y. 113 (failing to keep a bridge in repair). More fully, *post*, chap. xxiii. The principle on which a public officer is held personally liable for injuries resulting from improper execution of official duties is well stated in Nowell v. Wright, 3 Allen (Mass.), 166; Blair v. Langtry, 21 Neb. 247. In Amy v. Supervisors, 11 Wall. 136 (1870), where *county supervisors were held to be personally liable for failing to levy a tax, as commanded by the court*, to pay the plaintiff's judgment, Mr. Justice Swayne, stating the principle of the decision, says: "The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct; mistake of duty and honest intentions will not excuse the offender." *Measure of damages*. Dow v. Humbert, 91 U. S. 294 (1875). Liability for *fraud*. Oakland v. Carpenter, 13 Cal. 540; *ante*, sec. 208, n.; *post*, sec. 910, n. A *ministerial officer*, acting in good faith, is liable for actual, but not for

<sup>1</sup> 2 Kyd, 50-94; Willc. 245-276; Glover, chap. xvi. pp. 327, 328; Grant, 250, 263. And see 2 Kent, Com. 278, 297, where amotion and disfranchisement are used as convertible terms; Angell & Ames,

Corp. chap. xii., where the earlier cases are quite fully collected, and the doctrine of the English decisions satisfactorily presented. Richards v. Clarksburg, 30 W. Va. 491 (1887), citing the text.

stitution from the old English municipal corporations, under which most of the cases on the subject of amotion and disfranchisement usually cited in the books arose. These cases, especially those relating to disfranchisement are, in general, inapplicable here, and should, it is believed by the author, be followed by our courts as precedents with unusual caution, and only when they rest upon or declare principles general in their nature, and which embrace in their operations municipal institutions possessing the distinctive characteristics of ours. Here, the inhabitants of the municipality are, by legislative enactment, the corporators; certain of those inhabitants (usually all of the adult male residents) have the constitutional or statutory right to elect the legislative or governing body, and also, frequently, the other more important officers of the corporation. It would seem that the English doctrine of *disfranchisement* of a corporator or member has no application to our municipal corporations, whether the corporator be considered the "inhabitant" or the "voter."

§ 239 (178). **Disfranchisement; English Doctrine not applicable here.** — Whether the power of disfranchisement be *incidental* to the corporation, or must be *expressly conferred*, respecting which there is in England some contrariety of view,<sup>1</sup> we need not inquire,

exemplary damages, for illegal acts injurious to private persons. *Tracy v. Swartout*, 10 Pet. (U. S.) 80 (1836) (action against collector of customs); *Ib.* 137; *Jenner v. Joliffe*, 9 Johns. 382. As no one is bound by an unauthorized ordinance, the municipal authorities enacting the same are not individually liable therefor. *So held*, in action by an ex-mayor against aldermen for depriving him of his office. *Jones v. Loving*, 55 Miss. 109; *supra*, sec. 235. A provision of law making a civil corporation liable "for the illegal doings and defaults" of its officers (there being no provision that the officers shall not also remain liable), does not deprive the party injured of his right to proceed personally against the officer or agent who committed the injury. Both are liable. *Rounds v. Mansfield*, 38 Me. (3 Heath) 586 (1854). *Election officers for refusing vote, when liable.* *Gordon v. Farrier*, 2 Doug. (Mich.) 411; *Carter v. Harrison*, 5 Blackf. 138; *Jeffries v. Ankeny*, 11 Ohio, 374; compare *Ramsey v. Riley*, 13 Ohio, 157. See *Jenkins v. Waldron*, 11

*Johns.* (N. Y.) 114; *Lincoln v. Hapgood*, 11 Mass. 350; *Bridge v. Lincoln*, 14 Mass. 367. *Collection and revenue officers not liable to the party paying for money voluntarily paid to them.* *Elliott v. Swartout*, 10 Pet. 137 (1836); *Thompson v. Stickney*, 6 Ala. 579. More fully, *post*, chap. xxiii. *When liable in trespass.* *McCoy v. Chillicothe*, 3 Ohio, 370; *Loomis v. Spencer*, 2 Paige, 153. *Recording officer.* *Ramsey v. Riley*, 13 Ohio, 157; approved, *Stewart v. Southard*, 17 Ohio, 402.

<sup>1</sup> Grant, 263. "This right [of disfranchisement] has been but sparingly exercised, though it is undoubtedly an *incident* to every corporation, with, perhaps, some exceptions in cases of trading and monetary bodies." *Ib.* *Willecock* (271, pl. 709) denies that it is an incidental right, and claims that the rule laid down in the second resolution (*Bagg's Case*) on this point, — that "no freeman of any corporation can be disfranchised by the corporation, unless they have authority to do so by the express words of the charter, or by

for here (were there no constitutional obstacles) the legislature never bestows upon the council, or governing body which represents the corporation, the right to disfranchise the citizen or corporator; and it is clear that such a formidable and extraordinary authority does not exist, and cannot be exercised by the council, as an incidental or implied right. To burn or destroy the charters of the corporation, or wilfully to falsify its books, were in England considered such breaches of duty on the part of a corporator as would work a forfeiture of the corporate character,<sup>1</sup> there being, according to Lord Coke, "a tacit condition annexed to the franchise, which, if he break, he may be disfranchised."<sup>2</sup> Surely, there is here no such tacit condition annexed to the constitutional or statutable right of a resident of a municipality to be and remain a corporator, though there may be a similar condition annexed to municipal offices. Wilfully to destroy or falsify the charter or books of a municipal corporation is an act which is punishable by the criminal codes of the different States; and if the offender is convicted and imprisoned, it may result as an incident of such conviction that he will cease, for the time, to be a resident, and hence will cease to be a member of the corporation; but the corporation itself has no power to disfranchise him, that is, to deprive him of the privileges and rights, without absolving him from the liabilities of other citizens, while he remains within the limits of the municipality.

§ 240 (179). **Amotion; Rex v. Richardson.** — The power to *amove* a corporate officer from his office, for reasonable and just cause, is one of the common-law incidents of all corporations.<sup>3</sup> This doctrine,

prescription," — is the law. Mr. Glover simply adopts Mr. Willcock's language. Glover, 335. Mr. Kyd's exposition of the *second* resolution in *Bagg's Case*, 2 Kyd, 52. And see leading case of *Rex v. Richardson*, 1 Burr. 517, which was a case of amotion, but has been often taken as asserting an incidental power to disfranchise for cause as well as to amove. Angell & Ames, secs. 408, 409. See, generally, *Commonwealth v. St. Patrick's Society*, 2 Binn. (Pa.) 448 (1810); *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Hopkinson v. Marquis of Exeter*, Law Rep. 5 Eq. 63; *State v. Georgia Med. Soc.*, 38 Ga. 608; s. c. 8 Am. Law Reg. (N. S.) 533, Mr. Mitchell's note.

<sup>1</sup> *Mayor v. Pilkinton*, 1 Keb. 597; *Rex v. Chalke*, 5 Mod. 257; 1 Lord Raym. 226; *Grant, Corp.* 265.

<sup>2</sup> 13 Coke, 98 a.

<sup>3</sup> *Rex v. Richardson*, 1 Burr. 517; *Rex v. Liverpool*, 2 Burr. 723; *Rex v. Doncaster*, 2 Burr. 738. *Jay's Case*, 1 Vent. 302; *Lord Bruce's Case*, 2 Stra. 819; *Rex v. Ponsonby*, 1 Ves. Jr. 1; *Rex v. Lyme Regis*, Doug. 153; *Rex v. Tidderley*, 1 Sid. 14, *per Hale*, C. B.; *Rex v. Taylor*, 3 Salk. 231; 1 Roll. Rep. 409; s. c. 3 Bulst. 189; *Rex v. Chalke*, 1 Lord Raym. 225; *Rex v. Heaven*, 2 Term R. 772; *Reg. v. Newbury*, 1 Queen's Bench, 751; 2 Kyd, 50-94, where the old cases are digested; Glover, chap. xvi.; Willc. 246; *Grant*, 240; Angell & Ames, chap. xii.; 2 Kent, Com. 297; *Richards v. Clarksburg*, 30 W. Va. 491 (1887); *State v. The Judges*, 35 La. An. 1075; *Ellison v. Raleigh*, 89 N. C. 125; *ante*, sec. 212, note.

though declared before,<sup>1</sup> has been considered as settled ever since Lord Mansfield's judgment in the well-known case of *The King v. Richardson*.<sup>2</sup> It is there denied that there can be no power of amotion unless given by charter or prescription; and the contrary doctrine is asserted,—that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental.

§ 241 (180). **Where Power of Amotion resided in old English Corporation.**—But the power to amove, like every other *incidental* power, is incident to the corporation *at large*, and not to any select body or particular part of it, and unless delegated to a select body or part, it must be exercised by the *whole corporation*, and at a *corporate assembly* regularly and *duly convened*.<sup>3</sup> The power to hold such an assembly is, however, implied in the power of amotion.<sup>4</sup>

§ 242 (181). **Power of Amotion in this country.**—By the *corporation at large*, as used in the preceding section, is meant the different ranks and orders which compose it, including the definite and indefinite bodies. The essentials in such a corporation of a valid corporate assembly have previously been described. Our American corporations, however, have no ranks, orders, or integral parts corresponding to the constitution of an old English corporation. Here the common council, or the elective governing body (whatever name be given to it), exercises all of the powers of the incorporated place. Has the council, as the representative of the corporation, the incidental powers of a corporation, such as the power to amove, or the

<sup>1</sup> Lord Bruce's Case, 2 Stra. 819, 820; Tiddlerley's Case, 1 Sid. 14, *per Hale*, C. B.

<sup>2</sup> *Rex v. Richardson*, 1 Burr. 517, noted *infra*, sec. 251. "It is necessary to the good order and government of corporate bodies that there should be such power [amotion], as much as the power of making by-laws." *Ib.*

<sup>3</sup> Lord Bruce's Case, 2 Stra. 819; *Rex v. Lyme Regis*, Doug. 153; *Rex v. Richardson*, *supra*; *Rex v. Doncaster*, Say. 38; *Rex v. Taylor*, 3 Salk. 231; *Rex v. Faversham*, 8 T. R. 356; *Fane's Case*, Doug. 153; Willc. 246, pl. 629; *Grant*, 240, 241; 2 Kyd, 56; *Glover*, 329; *State v. Jersey City*, 1 Dutch. (N. J.) 536 (1856). Even if the right to elect an officer be in a particular person or select class, the power to amove is not incidental to it,

but, unless expressly changed or limited by charter, it belongs to the corporation at large. Lord Mansfield seemed to be of opinion that it was competent to transfer this power from the whole body to a select body by an ordinance or by-law. *Bagg's Case*, 11 Co. 99 a; *Rex v. Richardson*, 1 Burr. 539. But this question seems not to have been directly determined. Willc. 247, pl. 634; *Ib.* 248, pl. 635; *State v. Jersey City*, 1 Dutch. (N. J.) 536. Under the Constitution of *Pennsylvania* municipal officers who hold their offices by appointment *may be removed* at the pleasure of the power appointing them. *Houseman v. Commonwealth*, 100 Pa. St. 222.

<sup>4</sup> *Fane's Case*, Doug. 153; *Rex v. Lyme Regis*, *Ib.* 149.



power to ordain by-laws? Or is the council in the nature of a select body, possessing no right to exercise any of the ordinary incidental powers of the corporation, unless expressly authorized by charter or legislative grant? The question not being judicially settled as to our municipal corporations, the opinion is ventured that, in the absence of an express grant or statute conferring or limiting the power, the common council of one of our municipal corporations as ordinarily constituted, does possess, in the absence of any express or implied restriction in the charter, the incidental power, not only to make by-laws, but, *for cause, to expel its members, and, for cause, to remove corporate officers*, whether elected by it or by the people.

§ 243. **Same subject.**—Whatever necessity or reason exists for the right of amotion at common law, with respect to the corporation at large, would, in the absence of any controlling legislative provision, seem to exist here not only as to the doctrine itself, but also *with respect to that authorized body* by which alone the corporation acts, and which exercises all the corporate powers and functions. All of the inhabitants cannot meet and act in their primary capacity, except in organizations like the *towns* in the New England States; and if an implied or incidental right of amotion exists at all, it must be exercised by the council or governing body of the corporation. If it does not exist in the council, it cannot be *delegated* to it by an ordinance or by any act of the corporation, though if the right does exist, its exercise may, of course, be regulated by ordinance or by-law.<sup>1</sup> And the right may doubtless, we think, be inferred from the

<sup>1</sup> See, generally, Willard's Appeal, 4 R. I. 597; State, &c. v. Trustees, &c., 5 Ind. 89; State v. Bryce, 7 Ohio, part II. [82] 414; Commonwealth v. St. Patrick's Society, 2 Binn. (Pa.) 448; Commonwealth v. Bussier, 5 Serg. & Rawle (Pa.), 451; Commonwealth v. Guardians, &c., 6 Serg. & Rawle (Pa.), 469; Commonwealth v. Sutherland, 3 Serg. & Rawle (Pa.), 145; Johns v. Nicholls, 2 Dall. 184; 1 Yeates, 80; People v. Comptroller, &c., 20 Wend. (N. Y.) 595; State, &c. v. Lingo, 26 Mo. 496; Fawcett v. Charles, 13 Wend. 473; Hoboken v. Gear, 3 Dutch. (N. J.) 265; People v. Board of Trade, 45 Ill. 112 (1867); Neall v. Hill, 16 Cal. 145; State v. Chamber of Commerce, 20 Wis. 63; People v. Medical Society, 24 Barb. (N. Y.) 570; Evans v. Philadelphia Club, 50 Pa. St. 107; State v. Georgia Medical Society, 38 Ga. 608; s. c. 8 Am.

Law Reg. (N. S.) 533, and note; Smith v. Smith, 3 Desaus. 557. But see State v. Jersey City, 1 Dutch. (N. J.) 536, in which the power to expel a member of the council was expressly conferred, but where Mr. Justice Potts, delivering the opinion of the court, says: "The rule is well settled that a corporation has, at common law, an inherent jurisdiction to expel a member for sufficient cause." After noticing the offences which will justify expulsion, he adds: "But the jurisdiction in this case is not derived from the common law. The common council is not the corporation, and, whatever powers a municipal corporation may have to amove or expel a member at common law, it is clear that the corporation itself has not, by any by-law, delegated any of them to the common council, and that body, therefore, cannot avail itself of the common-law

express power to make needful or reasonable by-laws, if there is nothing in the charter or legislation to rebut the inference.

§ 244 (182). **Special Statutory Tribunal.** — A provision in a city charter vesting *the board of aldermen with the sole power to try all impeachments of city officers*, the judgment only extending to removal and disqualification to hold any corporate office under the charter, *is not unconstitutional* as authorizing the exercise of judicial powers by a legislative or municipal body, but is rather the exercise of a power necessary for its police and good administration.<sup>1</sup>

§ 245 (183). **Power to amove to be Strictly Pursued.** — When the terms under which the power of amotion is to be exercised are prescribed, they *must be pursued with strictness*.<sup>2</sup> Whether, if the

jurisdiction, vested as an inherent right in the corporation itself, to expel a member of their own body. 2 Bac. Abr. 21, title *Corporations*; Wille, on Corp. 629. The council derives its jurisdiction from the charter of the corporation." This case rules that where, in express terms, the right of the council to *expel a member for certain causes* is given, it cannot exercise the power for any other cause. And it would seem to be the opinion of the court, or at least of the judge delivering the opinion, that the common-law power of expulsion belonging to a corporation could not be exercised by the common council, that body not being the corporation in which the power is vested. *Infra*, secs. 245, note, 280. Same principle as to private corporations. *State v. Chamber of Commerce*, 20 Wis. 72. Compare *People v. Board of Trade*, 45 Ill. 113.

<sup>1</sup> *State v. Ramos*, 10 La. An. 420. See *People v. Bearfield*, 35 Barb. (N. Y.) 254, *supra*, sec. 200. A board of aldermen, sitting in a judicial capacity as a court of impeachment to try charges preferred against a city officer by another branch of the municipal governing body, is a court of limited jurisdiction, and, if not sworn, or not sworn by an officer authorized to administer oaths, their proceedings and judgment of guilty are void, and create no vacancy. *Tompert v. Lithgow*, 1 Bush (Ky.), 176 (1866). See *Hadley v. Mayor &c.*, 33 N. Y. 603; cited *infra*, sec. 253, note.

<sup>2</sup> *State v. Lingo*, 26 Mo. (5 Jones) 496;

*State v. Trustees of University*, 5 Ind. 77, 89 (1854); *State v. Bryce*, 7 Ohio, part II. [82]414; *State v. Chamber of Commerce*, 20 Wis. 63; *Regina v. Sutton*, 10 Mod. 76; *Paston v. Urber*, Hutt. 103; *Regina v. Ricketts*, 7 Ad. & El. 966; *Rex v. Oxford*, 6 Ad. & El. 349; *Commonwealth v. Sutherland*, 3 Serg. & Rawle (Pa.), 145; *Commonwealth v. Shaver*, 3 Watts & S. (Pa.) 338; *Murphy v. Webster*, 131 Mass. 482. In the *Queen v. Sutton*, *supra*, so strictly was a clause in a charter conferring the right of removal construed, that it was held that where acts were to be done by a *majority*, that word was to be understood as a majority of the whole corporation, and that if the officer whose removal was proposed was a member it could be effected only by a majority of all the members, including himself, and that his personal interest did not exclude him from voting as a member upon the question. See, also, *State v. Jersey City*, 1 Dutch. (N. J.) 536; *Madison v. Korbly*, 32 Ind. 74; *State v. McGarry*, 21 Wis. 496, where "other cause" for removal was held to mean "other like cause." The *Circuit Court of the United States* has no jurisdiction to restrain the mayor or city authorities from removing a city officer, upon charges of malfeasance in office. An injunction issued in such a case and proceedings in contempt for disobedience of the writ, held void. *Re Sawyer*, 124 U. S. 200; *supra*, sec. 202, note; more fully, *post*, chap. xxii.

power to *expel* or remove be given for certain causes, this excludes the right to exercise the power in any other case, will depend upon the intent of the legislature to be gathered from a consideration of the whole charter or statute. Power to appoint "subject to removal only for," &c., clearly limits the power of removal to the specified causes.<sup>1</sup> Express power of expulsion or removal for specified reasons was, in New Jersey and in Georgia, considered to exclude any implied power, and to limit the right to the enumerated causes.<sup>2</sup>

§ 246 (184). **Power of Expulsion for Specified Causes construed.**—A charter of a municipal corporation gave to the common council express power to "*expel a member for disorderly conduct*," and one of the aldermen, being guilty of official corruption in receiving bribes, was, after a hearing, expelled from the council. The court was of opinion that the question as to the right to expel for the conduct charged, depended upon the construction of the words "disorderly conduct;" and it held that receiving bribes for his official influence and votes was *disorderly conduct*, within the meaning of the charter.<sup>3</sup> In another case, the charter authorized the council "to dismiss the marshal for malpractice in office, or neglect of duty;" and it was held that the council could not remove this officer for the crime of gambling, as this was neither malpractice in office nor official neglect, within the meaning of the charter.<sup>4</sup>

<sup>1</sup> *People v. Higgins*, 15 Ill. 110. See *supra*, sec. 243, note.

<sup>2</sup> *State v. Jersey City*, 1 Dutch. (N. J.) 536 (1856); *The Mayor, &c. v. Shaw*, 16 Ga. 172 (1854). See s. c. 19 Ga. 468; 21 Ga. 280; 25 Ga. 590; *Clary v. Trenton*, 50 N. J. L. 331 (1888); *Clark v. Cape May*, 50 N. J. L. 558 (1888). But see *Commonwealth v. St. Patrick's Society*, 2 Binn. (Pa.) 441; 4 Binn. (Pa.) 448; *Angell & Ames*, sec. 415. Under the *Illinois* statute, it is held that the county authorities do not possess general powers of removal, and that they cannot remove a treasurer elected by the people, except for causes specified in the statute; but it may be observed that a county treasurer is a public and not a corporate officer. *Clark v. The People*, 15 Ill. 213 (1853). So a power of removal conferred upon the mayor and common council cannot be exercised by the council alone. *Charles v. Hoboken*, 3 Dutch. (N. J.) 203.

<sup>3</sup> *State v. Jersey City*, 1 Dutch. (N. J.) 536 (1856).

<sup>4</sup> *Mayor v. Shaw, &c.*, 16 Ga. 172 (1854). Relator was removed from the office of policeman of the city of New York, by the board of police, under the charge of "*conduct unbecoming an officer*," this being one of the offences for which, under the statute, a policeman can be removed. The specifications were that he was appointed policeman contrary to law when he was more than thirty years of age, and that he had been appointed after having resigned from the force without a vote by yeas and nays, contrary to the requirements of law. It was held that these specifications had only reference to relator's title to the office, and not to his conduct while an officer, and did not authorize the removal. *People, ex rel. Clapp v. Board of Police*, 72 N. Y. 415 (1878). Reported below, 5 Hun, 457.

*Power to punish for contempt.* Whether the council possesses the power to punish for contempt depends upon the provisions of the charter. The power must, as the author conceives, be conferred either ex-

§ 247 (185). **Power to Expel construed and limited.** — The power to *expel a member of the council* does not authorize a resolution by it that "the president of the council be directed not to appoint a certain member on any committee, nor call his name, nor allow him to take part in the action of the board," since this would create no vacancy which could be supplied, but would leave the seat occupied, while it silenced the occupant, and left his constituents unrepresented.<sup>1</sup>

pressly or as incidental to some power which is conferred, or it will not exist. In *Doyle v. Falconer*, 1 Privy Council Appeals, 329, it was held that the colonial parliament of Dominica had not the inherent privilege of parliament *as a court*, and could not therefore punish for contempt; but in the later case of *The Speaker v. Glass*, 3 Privy Council Appeals, 560, it was decided that the delegation of legislative authority to the Victoria parliament was broad enough to include this power. These cases afford very interesting illustrations of the nature of the power to punish for contempt. *Power of courts of the United States to punish for contempt.* *Burr's Trial*, 355; *United States v. Hudson*, 7 Cranch, 32; *Kearney, In re*, 7 Wheat. 38. *Power of Congress.* 11 U. S. Stats. at Large, 155; 12 U. S. Stats. at Large, 333. The Constitution of the United States vests no general power in *either House of Congress to punish for contempt*. Either House may punish its own members for disorderly conduct, or for failure to attend its sessions, and may impeach officers of the government, and may, where an examination of witnesses is necessary in the performance of these duties, fine or imprison a contumacious witness; but neither house can commit a witness for contempt for refusing to answer questions concerning the private affairs of citizens; for example, "the real estate pool" in the District of Columbia, such an investigation being judicial, *not* legislative, and the sergeant-at-arms cannot justify in an action for false imprisonment under such an order. *Kilbourn v. Thompson*, 103 U. S. 168 (1880).

Where the General Incorporation Act authorized the *removal of the mayor*, among other things, for "wilful violation of any of the ordinances of such town or

city," and provided for trial before the board of aldermen, who were empowered to enter judgment of removal against him upon finding that the charges were "a sufficient cause for removal from office," it was held that the aldermen were not invested with unlimited discretion, without regard to whether he was guilty of an offence in law or not; and that a violation of an ordinance which was void for being unreasonable and in contravention of common right, did not furnish proper ground for removal. *Milliken v. Weatherford*, 54 Tex. 388.

<sup>1</sup> *State v. Jersey City*, 1 Dutch. (N. J.) 536 (1856). See *State v. Chamber of Commerce*, 20 Wis. 72. *Power to suspend.* Whether, pending proceedings to expel, a member can be suspended from his duties, was a question not determined in the case; but in *The State, &c. v. Lingo*, 26 Mo. 496 (1858), it was held that the power to provide for removing from office corporate officers gives the power to suspend from office during the investigation of the charges for which the suspension was made. The court say, "The power to remove necessarily includes the minor power to suspend." *Ib.* 499.

The charter of a city empowered the mayor and aldermen for sufficient cause to remove constables and police officers. By a vote of the mayor and aldermen, the plaintiff, a constable and police officer, was "suspended from duty on the police," and from that time was not permitted to perform the duties of the office, although he was ready and offered to do so, until he was afterwards reinstated. It was held that he could not recover for services during the period of his suspension. *Ladd, J.*, says: "It does not seem to require argument to show that the power to remove must include the power

§ 248 (186). **Re-election of expelled Member of Council.** — The expulsion of a member of the common council does *not disqualify* him from being *re-elected* to the same office, unless it is expressly so provided by the charter; for where the law annexes a disqualification to an offence, it does so in terms. Hence, if a member, having been expelled even for bribery, be re-elected, he cannot be expelled a second time for the same identical act for which he had before been expelled.<sup>1</sup>

§ 249 (187). **Instance of implied Power of Removal for Cause by the appointing Power.** — It was held in a case in Rhode Island that a clerk of a school committee — an officer created by the school law, and necessary to the organization and legal action of the committee — may, after an election by the committee, be removed from office by the committee, but only for cause, as the statute gives no express power to remove, and after due notice and opportunity given him to defend himself upon the charges presented.<sup>2</sup>

§ 250 (188). **Power of Removal.** — Where an officer is *appointed during pleasure*, or where the *power of removal is discretionary*, the power to remove may be exercised *without notice or hearing*. But where the appointment is *during good behavior*, or where the removal can only be for certain *specified causes*, the power of removal cannot, as will presently be shown, be exercised, unless there be a formulated charge against the officer, *notice* to him of the accusation, and a *hearing* of the evidence in support of the charge, and an opportunity given to the party of making defence.<sup>3</sup>

to suspend." *Shannon v. Portsmouth*, 54 N. H. 183 (1874); *Westberg v. Kansas City*, 64 Mo. 493 (1877); *Wayne Co. v. Benoit*, 20 Mich. 176; *Attorney-General v. Davis*, 44 Mo. 131; *Primm v. Carondelet*, 23 Mo. 22. *Infra*, sec. 248, note.

<sup>1</sup> *State v. Jersey City*, 1 Dutch. (N. J.) 536 (1856). If the common council, without authority, suspend a member from the duties of his office, *mandamus* is a proper remedy to restore him to the exercise of his legal rights. *Ib.*; *supra*, sec. 247, note; Willc. on Municipal Corporations, 368, pl. 74, 75; *Ib.* 377, pl. 96; 3 Black. Com. 110; *Rex v. Barker*, 3 Burr. 1266; Angell & Ames on Corporations, secs. 702, 706.

<sup>2</sup> *Willard's Appeal*, 4 R. I. 595, 597, *per Ames*, C. J., who says, "Such a power with regard to such an officer, un-

less expressly forbidden by law, is incidental to the committee, as necessary to enable it duly to perform its functions." *Ib.* p. 601. It is sufficient cause for the removal of such a clerk that he refuses to produce papers which belong to the body which elected him, and of which he is simply the custodian, or refuses to keep or amend the records when duly ordered to do so. *Ib.*

<sup>3</sup> *Field v. Commonwealth*, 32 Pa. St. 478 (1859); *Ramshay, In re*, 83 Eng. Com. Law, 174, 189 (1852); *Hennen, In re*, 13 Pet. (U. S.) 230; *Queen v. Governors, &c.*, 8 Ad. & El. 632; *Bagg's Case*, 11 Coke, 93 (b); *Rex v. Coventry*, 1 Ld. Raym. 391; *Dr. Gaskin's Case* 8 T. R. 209; *Rex v. Oxford*, 2 Salk. 428; *Rex v. Mayor, &c.*, 1 Lev. 291; 2 Kyd, 58, 59; Willc. 253, 254; *Grant*, 244; *Rex v. An-*

§ 251 (189). **Incidental Power to remove for Cause; Rex v. Richardson.** — In the leading case of *The King v. Richardson*, the point was decided, as above mentioned, that a corporation, in the absence of an express grant of authority, had the *incidental power* to make a by-law to remove officers for *just cause*. Lord Mansfield in that case classified the offences which would justify the exercise of the power; and his judgment therein has been followed both in England and in this country, in cases arising in private corporations not of a pecuniary character. According to Lord Mansfield, there are three sorts of offences for which an officer or corporator may be discharged: 1. Such as have *no immediate relation to his office*, but are themselves of so *infamous* a nature as to render the offender unfit to execute any public franchise. 2. Such as are only against his oath and *the duty of his office as a corporator*, and amount to breaches of the tacit condition annexed to his franchise or office. 3. Offences of a *mixed nature*, — as being an offence not only against the duty of his office, but also a matter indictable at the common law.<sup>1</sup> In offences of the *first* class the removal can only

dover, 1 Ld. Raym. 710; *Page v. Hardin*, 8 B. Mon. 648; *Hoboken v. Gear*, 3 Dutch. (N. J.) 265; *Madison v. Korbly*, 32 Ind. 74 (1869); *Stadler v. Detroit*, 13 Mich. 346 (1865). Charter power of removal, without cause, at any time, of a police patrol appointed for a year, see *Chicago v. Edwards*, 58 Ill. 252 (1871). As to the *removal*, by the appointing power, of officers, the duration of whose term is not fixed, see *People v. Comptroller, &c.*, 20 Wend. (N. Y.) 595; *Commonwealth v. Sutherland*, 3 Serg. & Rawle (Pa.), 145; *Field v. Girard College*, 54 Pa. St. 233; *State v. Doherty*, 25 La. An. 119 (1873); s. c. 13 Am. Rep. 131; *State v. St. Louis*, 90 Mo. 19; *People v. Nichols*, 79 N. Y. 582. A resolution to “*dispen-  
se with the services*” of an officer, passed by a council having power to remove him at its pleasure, was held to be a removal in *State v. Sohn*, 97 Ind. 101. Where *express power* is given by statute to the mayor to remove an officer at his pleasure, it seems to be clear that the mayor is the exclusive judge of the propriety of exercising the power. *People v. New York*, 82 N. Y. 491. The mayor of a city held to have no power to suspend the fire-engineer duly appointed by the mayor with the advice and consent of the council, and

declare vacancy, and appoint another person in his place. *State v. Bryson*, 44 Ohio St. 457; *State v. Hudson*, 44 Ohio St. 137. Power to remove officers under a special statute and charter provision, see *Ham v. Police Board*, 142 Mass. 90; *New Brunswick v. Fitzgerald*, 48 N. J. L. 457.

It is the law in England, as applied to the old corporations, that causes which *disqualify* the person to be an officer will not authorize the corporation to move him, but he must be ousted by *quo warranto*. The reason given is that one so disqualified is not, in law, a corporate officer, and hence cannot be moved as such by the corporation. *Rex v. Doncaster*, Say. 40; *Buller N. P.* 203; *Rex v. Lyme Regis*, Dong. 85; *Symmers v. Regem*, Cowp. 502; *Willc.* 259, pl. 669; *Willc.* 281, pl. 728. And see *Fawcett v. Charles*, 13 Wend. 473 (1835). It has elsewhere been shown (*ante*, sec. 200 *et seq.*) that with us the councils of municipal corporations are often made judges of the qualifications of their members and officers, and this may modify or change the rule above mentioned, which seems to rest on narrow and technical grounds.

<sup>1</sup> *Rex v. Richardson*, 1 Burr. 517, 538, (1758); followed, *Rex v. Liverpool*, 2

be made *after* there has been a previous conviction in a court of law; and an amotion will not be sustained by a subsequent conviction.<sup>1</sup> In offences of the *second* class the corporation may *try*, and if the charge is established, remove, without any previous or other proceeding in the courts.<sup>2</sup> In offences of the *third* class the English judges have differed on the point whether the officer may or may not be removed before a conviction in a court of justice. The principal cases and the result on this point are briefly stated in the note.<sup>3</sup>

Burr. 723; *supra*, sec. 240. So, also, in *Commonwealth v. St. Patrick's (Benevolent) Society*, 2 Binn. (Pa.) 441 (1810); *Commonwealth v. Guardians, &c.*, 6 Serg. & Rawle (Pa.), 469 (1821). These cases adopt Lord *Mansfield's* classification, and assert the inherent power of corporations to expel for offences falling within any of the three classes. See, also, *Butch. Benef. Assoc.* 35 Pa. St. 151; 38 Pa. St. 298; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Society, &c. v. Commonwealth*, 52 Pa. St. 125.

The courts in a proper case may, by *mandamus*, compel a corporation to amove an officer; and the result of the English cases on this point is considered to be that where the offence of the officer is such that the corporation has the *power* to amove, the court will only compel it to do so where some one is injured by the omission to remove; but where it is *required* to amove, or the office is declared by the charter or statute to be void if such an act be done or omitted, there the court will compel it to amove, though no one be shown to have been aggrieved. *Rex v. Truro*, 3 Barn. & Ald. 592; *Rex v. West Looe*, 5 Dowl. & R. 416; *Rex v. Totness*, 5 Dowl. & R. 483; *Grant on Corp.* 243, and note.

<sup>1</sup> *Rex v. Richardson*, *supra*, and cases cited in last note.

<sup>2</sup> *Rex v. Richardson*, *supra*; *Commonwealth v. St. Patrick's Society*, *supra*, and cases cited in last note but one.

<sup>3</sup> *Rex v. Carlisle*, Fortesc. 200; s. c. 11 Mod. 379. In this case the corporation, before conviction, amoved a capital citizen for giving a bribe to a freeman, and offering him another to influence his vote at the election for a mayor. The court's judgment was in favor of the right to

amove. Although there might have been a previous conviction, yet this being a great offence against the *duty of his office*, the corporation might amove without a conviction. In *Rex v. Derby*, Cas. temp. Hardw. 155, Lord *Hardwicke* mistook the above case on this point, and inclined to think there ought to be a previous conviction. And such seemed also to be the inclination of *Holt*, C. J., in *Rex v. Chalke*, Comb. 397, where the removal was before conviction, for criminally razing entries in the corporation books which were at first proper, but the point was not decided. In *Haddock's Case*, T. Raym. 439, the amotion was for riotously assembling and assaulting several corporators, thereby impeding the business of the corporation. It was considered that the offence was two-fold, — one against the duty of his office as a corporator, the other (wholly disconnected) of a riot. And as he might be guilty of one and yet be acquitted of the other, the corporation might amove without conviction; and the case is said to be different from that of *Chalke* (*supra*), for there the officer could not have been guilty of the offence at law without at the same time having been guilty of a breach of his duty. The cases decided are considered to favor this view, viz., if the act is criminal and single in its nature, so that a conviction or acquittal in the courts of law will necessarily determine the guilt or innocence of the party, there must be a conviction, but otherwise there may be a removal without, or independent of, a conviction. *Buller's N. P.* 206; *Willc.* 249-252; *Glover*, 331, 338; *Grant*, 240; 2 *Kyd*, 88-94, where the prior cases are digested and stated. Lord *Mansfield*, in *Rex v. Richardson*, 1 Burr. 538, leaves the point

§ 252 (190). **Scope of implied Power of Removal.** — Principle and sound policy require that the *implied power of removal* for offences against the corporation be restricted to acts of a serious nature directly affecting the rights and interests of the corporation.<sup>1</sup> Causes for removal have, in some instances, been held sufficient in England which would not probably be so regarded in this country. The principal English cases are given in the note. The sufficiency and reasonableness of the cause of removal are questions for the courts.<sup>2</sup>

untouched. A removal for a riot in the council-chamber, without a previous conviction, is said to have been held good. *Rex v. Yates*, Stiles, cited 8 Mod. 101. See, further, *Earle's Case*, Carth. 173; *Rex v. Wells*, 4 Burr. 1999; *Regina v. Newberry*, 1 Q. B. 751; 2 Bac. Abr. (Bouv. ed.) 476, and cases cited.

<sup>1</sup> *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Butch. B. Assoc.*, 35 Pa. St. 151; 38 Pa. St. 298; *Society, &c. v. Commonwealth*, 52 Pa. St. 125; *Commonwealth v. Philanthropic Society*, 5 Binn. (Pa.) 486; *State v. Common Council*, 9 Wis. 254; *Mayor, &c. v. Geisel*, 19 Ind. 344; *Same v. Wright*, 19 Ind. 346.

<sup>2</sup> *Rex v. Andover*, 3 Salk. 229. *Pov-erty* of alderman, so that he could not pay taxes, sufficient cause for removing him. *Id.* But not applicable here. But *bankruptcy* insufficient cause of amotion of councilman. *Rex v. Liverpool*, 2 Burr. 723; see *Rex v. Chitty*, 5 Ad. & E. 609. *Total desertion of duties* of office sufficient cause. *Buller's N. P.* 206; *Rex v. Richardson*, 1 Burr. 541. *When absence and non-attendance* upon meetings, and *neglect of duty*, will be sufficient cause. See *Rex v. Richardson*, *supra*; *Rex v. Wells*, 4 Burr. 2004; 1 Hawk. P. C. chap. lxvi. sec. 1, as to official neglect of duty; approved by Lord *Mansfield*, in case last cited; *Lord Bruce's Case*, 2 Stra. 819, and notes; *Reg. v. Ipswich*, 2 Ld. Raym. 1233; s. c. Salk. 443; *Buller's N. P.* 206, 207; *Lord Hawley's Case*, 1 Vent. 146; *Rex v. Harris*, 1 Barn. & Ad. 936; *Queen v. Mayor, &c., of Pomfret*, 10 Mod. 107; 2 Kyd, 65 *et seq.*, where the older cases are stated. Willc. 255-264; Angell & Ames, sec. 427, giving summary of English cases. Much depends upon the cause of the neglect, and whether the effect is to obstruct

or hinder the business of the corporation or officer from being done.

*Habitual drunkenness*, disqualifying from the performance of duty, is a sufficient cause to remove an alderman or officer charged with magisterial functions. *Rex v. Taylor*, 3 Salk. 231; 1 Rolle, 409; 3 Bulst. 190. But *casual intoxication*, or bring drunk by accident, is not a sufficient cause, for the reason (charitably allowed) that this is likely to happen to the best. *Rex v. Taylor*, *supra*, A. D. 1616. *Old age* is insufficient. *Bac. Abr. Corp. E.* 9; *Hazard's Case*, 2 Rolle, 11.

*Mere threats or attempts*, no injury resulting, not sufficient. *Bagg's Case*, 11 Coke, 93. *Insulting language, or libel* upon mayor or officers, held insufficient, on the ground that personal offences are to be punished by law, and not by the corporation. *Rex v. Oxford*, Palm. 455; *Bagg's Case*, 11 Coke, 93, 96, 97, 98, 99; *Clerk's Case*, 2 Cro. 506; *Buller's N. P.* 203; *Reg. v. Lane*, Fortesc. 275; s. c. 11 Mod. 270; *Earle's Case*, Carth. 174; *Willc.* 261, pl. 680. See *Regina v. Rogers*, 2 Ld. Raym. 777; *Innes v. Wylie*, 1 Carr. & K. 257; *Regina v. Treasury*, 10 Ad. & E. 374; 2 Perr. & D. 498.

*Official misconduct*, amounting to misdemeanor, has been before mentioned, and the cases cited. The misconduct must, it seems, specially relate to the execution of the office. *Rex v. Wells*, 4 Burr. 1999; see *Regina v. Newberry*, 1 Q. B. 751. If the same person hold two offices, misconduct with respect to one will authorize removal from that one, but not from both; but if the offence is against the duties of both, the removal may be from both. *Rex v. Chalke*, 1 Ld. Raym. 226; s. c. 5 Mod. 257; *Rex v. Doncaster*, 2 Ld. Raym. 1566; s. c. 1 Barnard. 265; *Rex v. Wells*,



§ 253 (191). **Proceedings to amove.** — Respecting the *proceedings to amove*, it has already been observed that they must be had by and before the *authorized body duly assembled*, in conformity with the rules on that subject, which are elsewhere stated.<sup>1</sup> The proceeding in all cases *where the amotion is for cause is adversary or judicial in its character*; and if the organic law of the corporation is silent as to the mode of procedure, the substantial principles of the common law as to proceedings affecting private rights must be observed.<sup>2</sup>

§ 254 (192). **Notice of Proceeding to amove.** — And *first*, the officer is entitled to a *personal notice* of the proceeding against him,

4 Burr. 1999; *Rex v. Harris*, 1 B. & Ad. 936. Misemployment of corporate funds in his custody is not sufficient cause of amotion, though generally it is good cause of suspension from a financial office; for the court will not grant a *mandamus* to restore until the accounts are made up and submitted to the corporation. *Rex v. Chalke*, 1 Ld. Raym. 226; s. c. 5 Mod. 259; *Rex v. London*, 2 Term R. 182; Willc. 262, pl. 685; Angell & Ames, sec. 428. On principle, it may be suggested that if an implied power of amotion exists at all, it should extend to a case where the financial officer of a corporation is misemploying its funds entrusted to his safe keeping.

<sup>1</sup> *Rex v. Taylor*, 3 Salk. 231; *Rex v. Sandys*, 2 Barnard. 302; *Taylor v. Gloucester*, 1 Roll. 409; s. c. 3 Bulst. 190; *Rex v. Chalke*, 1 Ld. Raym. 226; 2 Kyd. 57; *Grant*, 245, 275; Willc. 264, pl. 691; Willc. 266, pl. 698. Necessity for vote or corporate act, declaring the removal or expulsion. *Commonwealth v. Pennsylvania, &c. Institute*, 2 Serg. & Rawle (Pa.), 141; *Commonwealth v. German Society*, 15 Pa. St. 251; *Stadler v. Detroit*, 13 Mich. 346. Where the ordinance creating an office expressly reserves to the city council the power to remove the incumbent at pleasure, the repeal of the ordinance and notice to him of the repeal operate as a removal. *Chandler v. Lawrence*, 128 Mass. 213.

Where, by statute, the mayor, recorder, and an alderman were constituted a body to try charges against policemen appointed by the corporation, with power to suspend or remove, the presence of the mayor

is essential to the constitution of the legal body, and if one act in the trial of such a charge as mayor, who is not such *de jure* [or *de facto*], the order of removal is void. *Hadley v. Mayor, &c.*, 33 N. Y. 603; see *supra*, sec. 244. Special provision of charter construed to give the power of removal to the mayor and council, and not to the council alone. *Charles v. Hoboken*, 3 Dutch. (N. J.) 203. *Andrews v. King*, 77 Me. 224, where the officer was "subject after hearing to removal by the mayor, by and with the advice and consent of the aldermen," it being held that the hearing should have been by the "board of mayor and aldermen;" a hearing by the aldermen alone being held insufficient though the officer had consented to it. In this case it was also held that the mayor and aldermen should first find as a fact, and adjudicate, that sufficient cause for removal existed, before a valid order of removal could be made.

<sup>2</sup> *State v. Bryce*, 7 Ohio, part II. [82], 414, 416 (1836). "This proceeding," (amoval of a trustee of the university) "is essentially adversary; the justice of the common law permits no investigation of facts which may be followed by a loss of a right or by the infliction of a penalty, to be conducted *ex parte*." *Ib.*, *per Lane, J.*, *Murdock v. Academy*, 12 Pick. 244; *State v. Trustees, &c.*, 5 Ind. 77. Charter mode, if prescribed, must be pursued. *Ib.*; *Bacher's Case*, 20 Pa. St. 425; see *People v. Bearfield*, 35 Barb. (N. Y.) 254; *State v. Common Council*, 9 Wis. 254; *Madison v. Korbly*, 32 Ind. 74; *Tompert v. Lithgow*, 1 Bush, (Ky.) 176 (1866).

and of the time when the trial body will meet. It is not necessary that the notice, citation, or summons set out the charges in detail, but it should contain the substantial fact that a proceeding to amove is intended.<sup>1</sup> The analogies of the ordinary procedure in the courts of the State (in the absence of statute or by-law) may be followed, respecting such details as the notice or summons, mode of service, &c. *Notice may be dispensed with:* 1. By appearance and answer to the charges.<sup>2</sup> 2. By a total desertion of the place,<sup>3</sup> so that it is not practicable to give the notice; as where the officer has permanently, not temporarily, left the municipality and resides constantly elsewhere with his family. Though he may have been absent or left the borough, yet if he return and be in the place at the time of the amotion, he is entitled to notice.<sup>4</sup> If the amotion be for good cause, such as conviction of an infamous crime,<sup>5</sup> or the repeated declaration of the officer that he would not discharge the duties of his office,<sup>6</sup> while it would be more regular to give the notice, yet its omission will not entitle him to a *mandamus* to be restored; for if restored he could be amoved again, and the courts will not order a restoration where they can see that there is good ground of removal, and that the order to restore would be without practical and useful effect.<sup>7</sup> With these exceptions, the party is entitled to no-

<sup>1</sup> *Queen v. Saddlers' Co.*, 10 House of Lords Cases, 404; *State v. Bryce*, *supra*; *Rex v. Richardson*, 1 Burr. 540; *Rex v. Doncaster*, 2 Burr. 738; see 1 B. & Ad. 942; *Rex v. Liverpool*, 2 Burr. 731; *Bagg's Case*, 11 Rep. 99 a; *Rex v. Wilton*, 5 Mod. 259; *Exeter v. Glyde*, 4 Mod. 37; *Reg. v. Ipswich*, 2 Ld. Raym. 1240; Willc. 264, 265; *Innes v. Wylie*, 1 C. & K. 257; *South P. R. Co.*, 5 Ind. 165; *People v. Benevolent Society*, 24 How. Pr. 216; *Delacey v. Neuse, &c. Co.*, 1 Hawks (N. C.), 274; *Commonwealth v. Pennsylvania Benef. Institute*, 2 Serg. & Rawle (Pa.), 141; *Society v. Vandyke*, 2 Whart. (Pa.) 309; *Nichols, In re*, 6 Abb. New Cas. 474; s. c. 57 How. Pr. 395; *People, ex rel. v. Commissioners, &c., of Brooklyn*, 106 N. Y. 64; *People v. Nichols*, 79 N. Y. 582. Where the power of removal is vested in the mayor for cause, he acts judicially, and a writ of prohibition will lie against him, if he exceeds his jurisdiction. *People v. Cooper*, 57 How. Pr. 416. If the incumbent of an office uses the office as a means of wrong-doing, this is a good cause of removal, though

the acts in question are not of an official nature. *Ib.* Where power is given to remove for cause, a specification of the charges, notice, and an opportunity to be heard, are essential, though the charter be silent as to the procedure to be adopted in such a case. *State v. St. Louis*, 90 Mo. 19.

<sup>2</sup> Willc. 264; *Rex v. Wilton*, 2 Salk. 428; *Reg. v. Ipswich*, 2 Ld. Raym. 1240; *Rex v. Feversham*, 8 Term R. 356; *Rex v. Carmathen*, 1 Maule & Sel. 697; s. p. *Commonwealth v. Pennsylvania Benef. Institute*, 2 Serg. & Rawle, 141.

<sup>3</sup> Willc. 265, 266; *Grant*, 245; *Rex v. Harris*, 1 B. & Ad. 936; *Rex v. Shrewsbury*, Cases temp. Hardw. 151; 7 Mod. 202; *Reg. v. Truebooy*, 2 Ld. Raym. 1275; 11 Mod. 75; *Rex v. Grimes*, 5 Burr. 2601; *Rex v. Leicester*, 4 Burr. 2089.

<sup>4</sup> *Rex v. Leicester*, 4 Burr. 2089.

<sup>5</sup> *Angell & Ames Corp. sec. 422*, where this opinion is expressed; *Grant*, 265; *Rex v. Chalke*, 1 Ld. Raym. 226.

<sup>6</sup> *Rex v. Axbridge*, Cowp. 523; see 2 Term R. 182; *Grant Corp.* 245.

<sup>7</sup> *Rex v. Griffiths*, 5 B. & Ald. 735; see *Blaggrave's Case*, 2 Sid. 6, 49, 72; *Rex*

tice of the intention to amove, so that he may have full and fair opportunity to be heard in his defence.

§ 255 (193). **The Charges must be formulated: Opportunity to defend.**—There must be a *charge*, or charges, against him, *specifically stated*, with substantial certainty; yet the technical nicety required in indictments is not necessary.<sup>1</sup> And *reasonable time and opportunity must be given to answer* the charges and to produce his testimony; and he is also entitled to be heard and defended by counsel, and to cross-examine the witnesses, and to except to the proofs against him.<sup>2</sup> If the charge be not denied, still it must, if not admitted, be examined and proved.<sup>3</sup> Where the specific charge stated is insufficient to justify the removal, or where the removal is erroneous and no good and sufficient ground therefor appears, the officer is entitled to a *mandamus to restore him*.<sup>4</sup> But where the proceedings are in conformity with the charter, and are regular, the sentence will not be inquired into collaterally, nor its merits examined by *mandamus* or action.<sup>5</sup>

*v. Rowe*, 1 Show. 188; *s. c. Carth.* 199; *Grant, Corp.* 245. If one irregularly amoved for good cause be restored by *mandamus*, he may be again amoved by regular proceedings *de novo*. *Taylor v. Gloucester*, 3 Bulst. 190; *Reg. v. Ipswich*, 2 Ld. Raym. 1233. In such case the office is vacated from the time of the second amotion; the proceedings do not relate back to the former irregular amotion. *Willc.* 269, pl. 707.

<sup>1</sup> *Tompert v. Lithgow*, 1 Bush (Ky.), 176 (1866); *Rex v. Lyme Regis*, Doug. 179; *Bagg's Case*, 11 Co. 99 *a*; *s. c.* 1 Roll. 225; *Glover*, 334; *Willc.* 267.

<sup>2</sup> *State v. Bryce*, 7 Ohio, part II. [82], 414 (1836); *Rex v. Richardson*, 1 Burr. 540; *Rex v. Liverpool*, 2 Burr. 734; *Murdock v. Academy*, 12 Pick. (Mass.) 244, where the requisites of a valid proceeding to amove are stated. *Rex v. Chalke*, 1 Ld. Raym. 226; *Rex v. Derby*, Cas. Temp. Hardw. 154. *Ante*, sec. 254, note.

<sup>3</sup> *Rex v. Faversham*, 8 Term R. 356; *Harman v. Tappenden*, 1 East, 562; *Willc.* 267; *Glover*, 334; *Murdock v. Academy*, 12 Pick. (Mass.) 244. A municipal officer, when removed by the corporation appointing him, is entitled to actual notice of his removal, and to compensation until

he receives such notice. *Jarvis v. Mayor, &c. of New York*, 2 N. Y. Leg. Obs. 396.

<sup>4</sup> *Reg. v. Ipswich*, 2 Ld. Raym. 1240; *Madison v. Korbly*, 32 Ind. 74 (1869); *Commonwealth v. German Society*, 15 Pa. St. 251 (1850); *State v. Jersey City*, 1 Dutch. (N. J.) 536. The restoration puts him in the same situation that he was before the attempted removal. *Willc.* 269; *post*, sec. 847. Since there is an adequate remedy at law by *quo warranto* (*post*, chap. xxi.) or by *mandamus* to restore (*post* sec. 847), *equity, will not enjoin* the corporate authorities from making an unlawful removal or appointing a successor. *Delahanty v. Warner*, 75 Ill. 185 (1874); *s. c.* 20 Am. Rep. 237. *Post*, sec. 275. Under the statute of *Florida* the action of a council in amoving an officer is reviewable by *mandamus*, and in that proceeding the court will review all the action of the council and the testimony adduced before it. *Donnelly v. Teasdale*, 21 Fla. 652.

<sup>5</sup> *Society, &c. v. Commonwealth*, 52 Pa. St. 125 (1866); *People v. Bearfield*, 35 Barb. (N. Y.) 254. Though the amotion be illegal, the officers who took part in it are not *personally liable*, unless both malice and want of probable cause be

§ 256 (194). **Effect of Valid Amotion; Vacancy.** — If the amotion be *legal and authorized*, the office becomes *ipso facto vacant* from the time the amotion is declared, and another person may be elected or appointed to fill it. If the removed officer afterward continues to act, he is a mere usurper, and may be ousted on *quo warranto* and punished. Amotion from one office does not, of course, affect the party's title to another.<sup>1</sup>

shown. *Harman v. Tappenden*, 3 Espin. 278; s. c. 1 East, 555; *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 289.

*Jurisdiction* as to the *election and amotion* of officers in corporations, when not changed by statute *belongs to the common-law courts and not to equity*. *Attorney-General v. Earl Clarendon*, 17 Ves. 491; *Dyer*, 332; *Cochran v. McCleary*, 22 Iowa, 75. See, also, *In re Sawyer*, 124 U. S. 200 (1887); *ante*, secs. 202, note, 204, note, 275, and note. Where, by charter, a city council had power to remove police officers, and the mayor had power also to increase or diminish their number at discretion, it was held, in an action brought by a policeman, removed by the mayor for malfeasance, for his salary, that in the former case the judgment of the council, being judicial, was conclusive, while the action of the mayor, being ministerial, was not conclusive upon the officer. *Oliver v. Americus*, 69 Ga. 165; *ante*, sec. 202; *post*, sec. 275.

<sup>1</sup> *Jay's Case*, 1 Vent. 302; *Symmers v. Regem*, Cowp. 503; *Willc. 268*, pl. 704; *Rex v. Doncaster*, 2 Ld. Raym. 1566; 1 Barnard. 265; *Rex v. Chalke*, 1 Ld. Raym. 226. Mr. Willcock, 267, pl. 704, whose

language is adopted by Glover (*Corp. 334*), states that if a person legally amoved continues to act, he is a mere usurper, and that "all corporate acts in which he has concurred are equally void, as though he had never been elected or admitted." But if he is permitted to act after amotion, it would probably be considered, in this country, that his acts would, as to third persons, be valid, like those of an officer *de facto*. If the removal be unauthorized, Mr. Willcock states the rule to be, "That all corporate acts in which he has concurred between the moment of his removal and restitution are of equal validity as if he had never been amoved," &c. *Willc. 269*, pl. 707. If he was regularly present and concurred, it can well be seen how this should be so; but his concurrence when not regularly acting, or when a *de facto* successor has taken his place and is acting, would not seem to alter the legal quality of the act. In this country the acts of a *de facto* officer of a *de jure* office are everywhere considered valid as respects the public. *Ante*, secs. 215, note, 221, note, 230, note, 235, note, 237, note. *Post*, secs. 276, 892, note; *Cushing v. Frankfort*, 57 Me. 541.

## CHAPTER X.

## CORPORATE MEETINGS.

§ 257 (195). **Subject outlined.** — The *subject of Corporate Meetings* will be considered under the following general heads: —

1. Common Law Requisites of a Valid Corporate Meeting — secs. 258–261.

2. Notice of Corporate Meetings at Common Law and under the English Municipal Corporations Act — secs. 262–265.

3. New England Town Meetings; Requisites of Notice and Power of Adjournment — secs. 266–269.

4. Constitution and Meetings of Councils, or of Select Governing Bodies, and herein of Quorums and Majorities; of Integral Parts; and of Stated, Special, and Adjourned Meetings — secs. 270–287.

5. Mode of Proceeding when convened — secs. 288–292.

§ 258 (196). **Common-Law Requisites of a Valid Corporate Meeting.** — As respects *their mode of action*, municipal corporations in this country are of *two general classes*. In the one, as in the organization of *towns* in the New England States, heretofore adverted to, *all of the qualified inhabitants* meet, act, and vote, *in person*.<sup>1</sup> In the other, which is the kind that prevails generally throughout the States, and even in many of the larger places in New England, the affairs of the town or city are administered by a *select or representative body*, usually denominated the council, and which is elected by the qualified voters of the incorporated place, not assembled together in a meeting, but at an election, where each elector votes separately and by ballot.<sup>2</sup>

§ 259 (197). **Corporate Meetings.** — The *latter class* of corporations is properly municipal. The *former class* is not so strictly municipal as it is public in its character.<sup>3</sup> Where there is a *council* or *governing body*, the inhabitants or voters, in their natural capacity, have no power to act for or to bind the corporation, but the corpora-

<sup>1</sup> *Ante*, chap. ii. sec. 23.

<sup>3</sup> *Ante*, chap. i. sec. 9; chap. ii. secs.

<sup>2</sup> *Ante*, chap. ii. sec. 28 *et seq.*; chap. 22, 23, and note.  
ix, sec. 194 *et seq.*

tion must act, and can be bound only through the medium of this body. Therefore, authorized acts done by the council are not their acts, but those of the corporation. The council is a body which is constantly changing; it is simply the agent of the corporation. But its members, it has been well observed, are not only not *the* municipal corporation, but are not even *a* corporation.<sup>1</sup> Whether the corporation be of the one class or the other, *its affairs must be transacted at a corporate meeting*, in the one case of the qualified inhabitants, and in the other of the members of the council or governing body, duly convened at the proper time and place, and upon due notice in cases where notice is requisite.<sup>2</sup>

§ 260 (198). **Requisites of a valid Corporate Meeting of the old English Municipal Corporations.** — In England, prior to the General Municipal Corporations Act of 1835,<sup>3</sup> the *requisites of a valid corporate meeting* depended upon the constitution of the particular corporation under its charter, or prescriptive usage. To constitute a *corporate assembly* there must *at common law* be present the mayor or other head-officer (he being considered an *integral part* of the corporation,<sup>4</sup> in whose absence no valid corporate act could be done), a *majority* of the members of each select or definite class (these classes being also considered integral parts), and *some members* of the indefinite body (indefinite in point of numbers) usually styled the commonalty, and of each of the indefinite classes if there be more than one.<sup>5</sup> If there be no indefinite class, and the governing body consist of a select or definite class, the common-law requisite of a valid corporate assembly is, that a majority of the select class must be present; and if there be more than one such class, then a majority of each of the select classes of which the corporation is constituted; and the presence of the mayor at a select assembly of this kind is not necessary, unless it is expressly required.<sup>6</sup> But where a common council exists (which, in contemplation of the ancient law, is a meeting of the body at large, or those of them who

<sup>1</sup> *Regina v. Paramore*, 10 Ad. & El. 286; see *Regina v. York*, 2 Queen's B. 850; *Mayor v. Simpson*, 8 Queen's B. 73; *ante*, sec. 39. The Municipal Corporations Act 1882, sec. 10, expressly provides that "the council shall exercise all the powers vested in the corporation by this Act or otherwise." *Post*, sec. 265.

<sup>2</sup> *Dey v. Jersey City*, 19 N. J. Eq. 412 (1869); *Baltimore v. Poultney*, 25 Md. 18 (1866).

<sup>3</sup> *Ante*, chap. iii. sec. 35 *et seq.*

<sup>4</sup> *Ante*, chap. iii. sec. 35. Further as to mayor, see *ante*, chap. ix., relating to Municipal Elections and Officers, sec. 208.

<sup>5</sup> Wille. 52, 53, 66; *Rex v. Atkyns*, 3 Mod. 23; 1 Rol. Abr. 514; *Rex v. Carter*, Cowp. 59; *Rex v. Smart*, 4 Burr. 2143; *Rex v. Gaborian*, 11 East, 87, note; *Rex v. Morris*, 4 East, 26; *Rex v. Bellringer*, 4 Term R. 823; *Rex v. Miller*, 6 Term R. 278; *Rex v. Varls*, Cowp. 250; *Rex v. Monday*, Cowp. 539.

<sup>6</sup> See authorities cited in the last note.

thought proper to attend, or were considered by their fellow freemen the men best fitted to attend), though such council has become a select or definite class, there the presence of the mayor or head presiding officer is necessary to a valid assembly, though such presence be not required by the charter.<sup>1</sup>

§ 261 (199). **Same subject.** — *A majority of each definite part* means a majority of the number of members of which that part consists, not merely a majority of the existing members of the part; but if the act is to be done by an indefinite body alone, it is valid if done at a meeting duly convened, although but a small fraction of the whole body at large be present. But while the presence of a majority of each definite integral part was necessary to a valid corporate meeting, yet it is settled law that a majority of those present, when legally assembled, will bind the rest.<sup>2</sup> Not only did the law of the old corporations in England require the presence of a majority of the members of each definite integral part, but it went to the extreme length of holding that where the presence of the mayor was necessary, he must be the *legal* mayor, and if he be merely an officer *de facto*, and afterwards be ousted on *quo warranto*, all corporate acts done under the sanction of his office are voidable.<sup>3</sup> By reason of the change in the constitution of municipal corporations in England, wrought by the Corporations Act of 1835, many of the rules respecting corporate meetings are no longer applicable, though, as we shall see, some of them still are. Under that statute the corporation acts, and can only act, through the council; and it is provided that all questions shall be decided by a majority of all the councillors present, including questions of adjournment; that one

<sup>1</sup> Willc. 67.

<sup>2</sup> *Rex v. Bellringer*, 4 Term R. 810 (1792), and cases cited; *Rex v. Miller*, 6 Term R. 268; *Rex v. Monday*, Cowp. 531, 538; *Rex v. Devonshire*, 1 Barn. & Cress. 609; *Rex v. Bower*, 1 Barn. & Cress. 492; *Rex v. May*, 4 Barn. & Ad. 843; *Rex v. Headley*, 7 Barn. & Cress. 496; Willc. 216, pl. 546; *Blacket v. Blizard*, 9 Barn. & Cress. 851; *Rogers, In re*, 7 Cow. (N. Y.) 526 (1827); *Ib.*, note *a*, 764; *Willecocks, In re*, 7 Cow. (N. Y.) 402, and note 462, 463 (1827); *Young v. Buckingham*, 5 Ohio, 485, 489 (1832); *Buell v. Buckingham*, 16 Iowa, 284 (1864), and cases cited; *State v. Delisseline*, 1 McCord (S. C.), 52 (1821); *State v. Huggins*, Harper (S. C.), 94 (1824); *Booker v.*

*Young*, 12 Gratt. (Va.) 303 (1855), approving Willc. 216, pl. 546; *Labourdette v. Municipality*, 2 La. An. 527 (1847); *Kingsbury v. School District*, 12 Met. (Mass.) 99 (1846); *Damon v. Granby*, 2 Pick. (Mass.) 345, 355 (1824); *Coles v. Trustees, &c., of Williamsburg*, 10 Wend. (N. Y.) 658 (1833); *Rex v. Greet*, 8 Barn. & Cress. 363; *The Queen, ex rel. Hyde v. Barnhart*, 7 Upper Can. L. J. 126; *The Queen, ex rel. Heenan v. Murray*, 1 Upper Can. L. J. N. s. 104; 2 Kent Com. 293; *Angell & Ames Corp. sec. 501*; *Launtz v. People*, 113 Ill. 137.

<sup>3</sup> *Rex v. Carter*, Cowp. 59; *Rex v. Hebden*, Andr. 391; *Rex v. Dawes*, 4 Burr. 2279; Willc. 54, 55.

third part of the number of the whole council shall be a quorum; that the mayor, if present, shall preside, and if absent, that a presiding officer shall be chosen, who shall have a second or casting vote.<sup>1</sup>

§ 262 (200). **Notice of Corporate Meetings at Common Law, and under the English Municipal Corporations Act.** — Due *notice of the time and place of a corporate meeting* is, by the English law, essential to its validity, or its power to do any act which shall bind the corporation. Respecting notice, the courts in England adopted certain rules, which, since they form the basis of much of the statute law in this country upon the subject, and have in the main been followed by our courts, and are founded on reason, may advantageously be here mentioned. All corporators are presumed to know of the days appointed by the charter, statute, usage, or by-laws, for the transaction of particular business, and hence no notice of such meeting for the transaction of *such* business is necessary, or for the transaction of the mere ordinary affairs of the corporation on such days; yet if it is intended to proceed to any other act of importance, a notice is necessary, the same as at any other time.

§ 263 (201). **Notice how Given and how Waived.** — A notice, when necessary, must, if practicable, *be given to every member* who has a right to vote, where the act is one to be done by a body consisting of a definite class or classes, and it must be given by, or issued by order of, some one who has the authority to convene a corporate meeting. But notice may be altogether *dispensed with* or its necessity *waived*, by the presence and consent of *every one* of those entitled to it.<sup>2</sup> It must be *served* personally upon every resident member, or left at his house. If temporarily absent, it may be left with his family, or at his house or last place of abode. An order to serve all is not sufficient; all, if practicable, must be served, but if the party entitled to notice has entirely quit the municipality, and has no family or house within its limits, notice is not necessary. It must be served a *reasonable time before* the hour of meeting, of which the court will judge from all the circumstances, including usage. If the charter provides a method by which the notice shall be served, its provisions must be strictly obeyed.<sup>3</sup>

<sup>1</sup> 5 and 6 Wm. IV. chap. lxxvi. sec. 69; Rawlinson on Corp. (5th ed.) 136; ante, chap. iii. secs. 35, 37; English Municipal Corporations Act 1882, sec. 21.

<sup>2</sup> Beaver Creek v. Hastings, 52 Mich. 528; Lord v. Anoka, 36 Minn. 176; State v. Smith, 22 Minn. 218.

<sup>3</sup> Lord v. Anoka, 36 Minn. 176.



§ 264 (202). **Requisites of Notice; Time and Place; Waiver.** — The notice must state *the time* of meeting, and *the place*, if it be not the usual place. It is not necessary to state what business is to be done, when the meeting relates only to the ordinary affairs of the corporation; but when it is for the purpose of electing or removing officers, passing ordinances, and the like, the fact should be stated, so that members may know that something more than the usual routine of business will be transacted. Such great importance is attached to notice that it can *only be waived by universal consent*; but if every member of a select body be present at a regular or stated meeting or at a special meeting, they may, if *every one* consents, but not otherwise, transact any business, ordinary or extraordinary, though no notice was given, or an insufficient notice, but the unanimity of consent should plainly appear from their recorded declaration, acts, or conduct. This unanimity is only necessary in order to enter upon the business; once commenced, the usual rules which govern the body and its actions apply. It is to be observed that the foregoing rules are not applicable where they are in conflict with the charter; and hence, if this imperatively requires a *special notice*, it cannot be waived, even by consent of all. The guild hall is the proper place for the meeting; if there be none, the meeting should be at the usual place; and if at any other place, it should be stated, to prevent fraud or surprise. Acts done at an unusual place will be closely scrutinized.<sup>1</sup>

§ 265 (203). **Notice under English Act.** — By the English Municipal Corporations Act,<sup>2</sup> *the subject of meetings*, stated and special,

<sup>1</sup> Authorities in support of the last and two preceding sections of the text: Willc. chap. i. sec. 42, *et seq.*; *Rex v. Hill*, 4 B. & C. 441; *Rex v. Liverpool*, 2 Burr. 724; *Rex v. Doncaster*, 2 Burr. 744; *Rex v. Theodorick*, 8 East, 545; *Rex v. May*, 5 Burr. 2682; *Rex v. Oxford*, Palm. 453; *Rex v. Grimes*, 5 Burr. 2601; *Kynaston v. Shrewsbury*, 2 Stra. 1051; *Musgrove v. Nevison*, 1 Stra. 584; s. c. 2 Ld. Raym. 1359; *Rex v. Mayor of Shrewsbury*, Cases temp. Hardw. 147; *Smyth v. Darley*, 2 House of Lords Cases, 789; *Grant on Corp.* 154-156; *Glover on Corp.* chap. viii. pp. 146-173. Formerly the rule that where notice was necessary every member must be notified, was applied only to the case of definite bodies, but it has more recently been declared to be applicable to

both select and indefinite bodies of public corporations. *Rex v. Langhorne*, 4 Ad. & El. 538. See, also, *Rex v. Faversham*, 8 Term. R. 356, *per Lord Kenyon, arguendo*. Where the city charter provided that the mayor might call special sessions of the council, and that he should "*specially state* to them when assembled the objects for which they have been convened, and their action shall be confined to such objects," an ordinance, passed at a meeting so called, having no reference to anything alluded to in the mayor's message, was declared void. *St. Louis v. Withaus*, 16 Mo. App. 247; affirmed on appeal, 90 Mo. 646.

<sup>2</sup> 5 and 6 Wm. IV. chap. lxxvi. sec. 69; *ante*, secs. 35, 37; Consolidated Act 1882, sec. 22.

and the notice and summons required are made matter of express regulation. It provides for every borough or city four quarterly meetings of the council in each year, to be held at a fixed date. No notice of the *business to be transacted* at these quarterly meetings is necessary; but three days' notice, by posting on or near the town hall, is required of the time and place of every intended meeting. Power is given to the mayor to call special meetings, or, on his refusal, to five members of the council, in which case the notice on or near the town hall shall state therein the business proposed to be transacted at such meeting, and in every case a summons (in addition to the notice) must be left at the usual place of abode of every member of the council, or at the premises occupied by him, in respect of which he is enrolled as a burgess, at least three clear days before the meeting, and no business can be transacted not specified in the summons. Power to *adjourn meetings* is expressly conferred upon the council by the same section.<sup>1</sup>

§ 266 (204). **New England Town Meetings; Notice and Adjournment.** — In New England the inhabitants are required to be notified or warned of *town meetings*. The requisites of such notice, and manner of giving it, are prescribed by statute. The provision is quite general that the articles or *matters to be acted upon shall be specified* or inserted in the notice or warrant. The courts in those States concur in requiring the statute as to notice to be faithfully observed by the officers charged with the duty of calling meetings. Meetings, to be valid, must be warned or notified according to law. The rule of the English courts applied to indefinite corporate bodies, that if all are present notice may, by unanimous consent, be waived,<sup>2</sup> is not regarded as applicable to the town meetings of New England, and hence a *de facto* meeting, not duly notified, though attended by all the voters capable of attending, is not a valid meeting, and its acts are void.<sup>3</sup>

<sup>1</sup> In construing this statute, it has been held that where the meeting is an *adjourned* quarterly meeting, *notice is necessary as to any business which was not actually entered upon* at the general or regularly quarterly meeting, but not otherwise; and hence, a coroner cannot be elected at such an adjourned quarterly meeting without the notice and summons which the statute requires. *Regina v. Grimshaw*, 10 Queen's Bench, 747, 755. See *Regina v. Thomas*, 8 Ad. & El. 183; *Rex v. Harris*, 1 Barn. & Ad. 936. *As to*

*notice*. *Town Council, &c. v. Court*, 1 E. & E. 770; *Regina v. Whipp*, 4 Queen's Bench, 141. *Ante*, sec. 259, note.

<sup>2</sup> *Rex v. Theodorick*, 8 East, 545; *ante*, sec. 28.

<sup>3</sup> *Hayward v. School District*, 2 Cush. (Mass.) 419 (1848); *Moor v. Newfield*, 4 Greenl. (Me.) 44 (1826); *School District v. Atherton*, 12 Met. (Mass.) 105 (1846); *Little v. Merrill*, 10 Pick. (Mass.) 543; *Perry v. Dover*, 12 Pick. (Mass.) 206; *Reynolds v. New Salem*, 6 Met. (Mass.) 340; *Congregational Society v. Sperry*, 10

§ 267 (205). **Requisites of Notice; Object of Meeting.** — It is, however, sufficient if the *purpose or object* of the meeting, *can fairly*

Conn. 200; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 130; *Rand v. Wilder*, 11 Cush. (Mass.) 294 (1853); *Stone v. School District*, 8 Cush. (Mass.) 592; *Brewster v. Hyde*, 7 N. H. 206; *Northwood v. Barrington*, 9 N. H. 369; *Giles v. School District*, 11 Fost. (31 N. H.) 304; *Lander v. School District*, 33 Me. 239 (1851); *Jordan v. School District*, 38 Me. 164 (1854.) So in *Vermont* it has been decided that it cannot be shown, by parol, to validate the *levy of tax* by a meeting not legally warned, that *all the legal voters* of the district were present at the meeting. *Sherwin v. Bugbee*, 17 Vt. 337 (1845); distinguished by the court from *Rex v. Theodorick*, 8 East, 543. And see, also, *Hunt v. School District*, 14 Vt. 300; *Pratt v. Swanton*, 15 Vt. 147. *Requisites of notice and sufficiency.* *Wiley v. Wilson*, 44 Vt. 407 (1872). Under the legislation of *Connecticut*, although it is held that the right to call a borough meeting for any lawful purpose is a legal right of every freeman, yet as it is shared with all other freemen it can be enforced only by a proceeding in the name of the State. *Peck v. Booth*, 42 Conn. 271 (1875). But see *post*, secs. 865, 900, 921, 923, n. "A town [in Connecticut] cannot make a contract, or authorize any officer or agent to make one in its behalf, except by vote in a town meeting duly notified or warned; and the notice or warning must specify the matter to be acted on, in order that all the inhabitants (whose property will be subject to be taken on execution to satisfy the obligations of the town) may know in advance what business is to be transacted at the meeting. If the subject of the vote is not specified in the notice or warning, the vote has no legal effect, and binds neither the town nor the inhabitants. No one can rely upon a vote as giving him any rights against the town, without proving a sufficient notice or warning of the meeting at which the vote was passed. *Reynolds v. New Salem*, 6 Met. 340; *Stoughton School District v. Atherton*, 12 Met. 105; *Moor v. Newfield*, 4 Greenl. 44; *Dillon Mun. Corp.* secs. 266-268. Upon this

point the statutes and decisions of *Connecticut* are perfectly clear." *Per Gray, J.*, *Bloomfield v. Charter Oak Bank*, 121 U. S. 129 (1886). A tax voted at a meeting not legally warned is illegal, and may be recovered back if the party did not pay it voluntarily. *Rideout v. School District*, 1 Allen (Mass.), 232 (1861). So it may be recovered back if the assessment is void. *Gerry v. Stoneham*, 1 Allen (Mass.), 319 (1861); *Tobey v. Wareham*, 2 Allen (Mass.), 594; *post*, chap. xxiii. See *Massachusetts* act of 1859, chap. cxviii., limiting, in such cases, the plaintiff's right of recovery to illegal excess of taxation.

*Authority* to the clerk to call and warn "the annual meetings," does not authorize him to call and warn special meetings; and the acts and doings of a special meeting thus called are wholly void. *School District v. Atherton*, 12 Met. (Mass.) 105 (1846). And authority "to warn" future meetings does not authorize him "to call" such meetings. *Stone v. School District*, 8 Cush. (Mass.) 592 (1851).

As to *proof of notice*, and the return of the person or officer making the warning, and what it shall show, see *State v. Williams*, 25 Me. 564 (1846), and the *Massachusetts* and *Maine* decisions therein cited and commented on. *Christ's Church v. Woodward*, 26 Me. (13 Shep.) 172 (1846); *Fossett v. Bearce*, 29 Me. 523 (1849); *Bearce v. Fossett*, 34 Me. 575 (1852); *Jordan v. School District*, 38 Me. 164 (1854); *Perry v. Dover*, 12 Pick. 206; *Houghton v. Davenport*, 23 Pick. 235; *Williams v. Lunenberg*, 21 Pick. 75; *Briggs v. Murdock*, 13 Pick. 305; *Rand v. Wilder*, 11 Cush. (Mass.) 294 (1853); *Cardigan v. Page*, 6 N. H. 182; *State v. Donahay*, 1 Vroom (30 N. J. L.), 404; *Hardcastle v. State* (27 N. J. L.), 552; *Detroit, &c. R. Co. v. Bearss*, 39 Ind. 598; *McPike v. Parr*, 51 Mo. 63; *French v. Edwards*, 13 Wall. 511. In *Sherwin v. Bugbee*, 17 Vt. 337, the strict view is held that the notice or warning must be recorded by the clerk. If, as recorded, the time for which the meeting was to be holden is not specified, the defect cannot be supplied by parol evidence that in the original warning the hour for

*be understood* from the notice or warrant.<sup>1</sup> And where the statute requires the *time and place* to be stated in the notice, its requirements must be observed, and there can be no legal meeting unless it originally assembles at the prescribed time and place. The law is strictly held as to the important particulars of time and place, as will appear by the illustrations in the notes.<sup>2</sup>

the meeting was named. This decision was not put upon the ground that the statute expressly required the warning to be recorded (which it did not), but upon the ground that the statute intended that the records should furnish all the means for testing the validity of the proceedings. See, also, *Stevens v. Society, &c.*, 12 Vt. 688 (1839); *post*, sec. 310. Where the place of an annual meeting is not fixed by statute or charter, notice of the meeting and place is essential. *United States v. McKelden*, 8 Rep. Dec. 1879, p. 778; *McArthur & Mackey*, 162. *Presumption in favor of legality* of meeting after lapse of long time. *Peterborough v. Lancaster*, 14 N. H. 382, 392; *post*, secs. 267, note, 285, note. *Length of notice*. *Hunt v. School District*, 14 Vt. 300; *Pratt v. Swanton*, 15 Vt. 247; *post*, sec. 285, note.

Under a statute of *New York*, the notice it required of school meetings held to be *directory* only, and the want of notice, when not fraudulently or wilfully omitted, does not render the meeting invalid, and its proceedings void. *Marchant v. Langworthy*, 6 Hill (N. Y.), 646; affirmed in error, 3 Denio (N. Y.), 526. See, also, *Williams v. Larkin*, 3 Denio, 114; *post*, sec. 290. Where the charter required the clerk to publish a notice requiring all persons interested in and opposed to a local improvement to attend before the council at a day named, and such notice was given and a hearing had, it was held that since the charter provided for but one notice and one hearing, it was a matter of discretion with the council whether another hearing should be allowed, and that subsequent action by the council without such notice or second hearing was not, under the circumstances, invalid. *Locke v. Rochester*, 5 Lansing (N. Y.), 11 (1871); *post*, secs. 803, 804, 927, note.

<sup>1</sup> *School District v. Blakeslee*, 13 Conn. 227.

<sup>2</sup> *Sherwin v. Bugbee*, 16 Vt. 439, 444, (1844). In reference to town meetings, the statute of *Vermont* requires that the notice shall be in writing, and shall "specify the business to be done, and the *time and place* of holding said meeting." Referring to this statute, *Redfield, J.* (in *Sherwin v. Bugbee, supra*), says: "We have no doubt the *place* of holding the meeting must be definitely specified. It would hardly do to warn a meeting to be held at *some* place in the district, or at a designated village, or at one of two or more dwelling-houses. So, too, in regard to *time*, there seems to be a propriety in having it definitely fixed. If the day, only, is named, the question immediately arises, Shall the inhabitants be required to attend the whole day? or, When can the meeting transact the business for which they meet, so as to bind the absent members? The fact that the meeting adjourned to another day and hour will not help the matter, on the obvious principle that the adjourned meeting could have no more authority than the original meeting, which was void."

Where it appears that a meeting was held on the day appointed, it will be presumed that it was held at a suitable time in the day, and pursuant to the notice. A meeting should be opened within a reasonable time after the hour specified; but what is such reasonable time depends upon circumstances. *School District v. Blakeslee*, 13 Conn. 227. Where a meeting was called at a certain school-house, it was held to mean within the walls of the building. An assemblage of some of the citizens in the highway near the school-house, and an adjournment to another place, was not a legal meeting, and its transactions were not binding, though the school-house was locked, and the weather cold and no fire in the building. *Chamberlain v. Dover*, 13 Me. 466 (1836). See, also, *Haines v. School District*, 41

§ 268 (206). **Specification of Object of the Meeting.** — Where the statute requires the notice “*to specify the business to be done,*” an omission to comply with this requirement makes the meeting void, and it is held that a notice stating generally “*to do any proper business,*” is insufficient, and the acts and votes of a meeting held under it are of no binding or legal force.<sup>1</sup> Indeed, the rule is general that where the statute requires the business to be stated in the warrant or notice, this is absolutely essential, and the meeting must be confined to those matters.<sup>2</sup>

§ 269 (207). **Power to adjourn.** — At a meeting duly constituted and organized, a majority of the members, electors, or corporators present, in the absence of any statute either conferring or denying the power, have, in the absence of any restrictive statute, the implied incidental corporate right *to adjourn the meeting* to another time,

Me. 246 (1856); *Kingsbury v. School District*, 12 Met. 99. But, in *Maine*, where a meeting had been called for the *basement of a building*, the fact that the meeting, which was crowded, being unable to take a division within the walls with ease or comfort, by unanimous consent and without protest from any one passed out into the open air, where the count was made, was held not to render its proceedings invalid. *Brown v. Winterport*, 79 Me. 305.

<sup>1</sup> *Hunt v. School District*, 14 Vt. 300 (1842); *Sherwin v. Bugbee*, 16 Vt. 439; s. c. 17 Vt. 337, 444 (1844). “Such meetings are void for all purposes of transacting business not specified” in the written notice required by the statute. *Ib.*, per *Redfield, J.*

<sup>2</sup> *Ib.*; *Johnson v. Wilson*, 2 N. H. 202; *Tucker v. Aiken*, 7 N. H. 113; *Baker v. Shepherd*, 4 Fost. (24 N. H.) 208.

*By-laws* passed at a town meeting not duly warned (as, for example, where the notice did not “specify the objects” of the meeting as required by statute) are void. *Hayden v. Noyes*, 5 Conn. 391 (1824); *Willard v. Killingworth*, 8 Conn. 247; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 130. The party claiming under a by-law must show it was passed at a meeting duly warned. 8 Conn. 247, *supra*. And must, perhaps, show all the

essentials of its validity, such as the due passage, publication, &c. *Ib.*

Where the statute requires that all matters to be acted upon at the meeting shall be inserted in the warrant or notice, a failure to do this will avoid as to both parties any contract that may be made, or any act that may be done, with respect to a matter not embraced in the warrant or notice. *Cornish v. Pease*, 19 Me. (1 Appl.) 184 (1841); *Spear v. Robinson*, 29 Me. (14 Shep.) 531 (1849); *Little v. Merrill*, 10 Pick. (Mass.) 543; *Blackburn v. Walpole*, 9 Pick. (Mass.) 97; *Torrey v. Millbury*, 21 Pick. (Mass.) 64; *Ib.* 75; *Hadsell v. Hancock*, 3 Gray (Mass.), 526; *Jones v. Andover*, 9 Pick. (Mass.) 146 (1829); *Kingsbury v. School District*, 12 Met. (Mass.) 99 (1846); *Rand v. Wilder*, 11 Cush. (Mass.) 294 (1853). But if the matter is embraced in the warrant or notice, and the meeting duly met, it is no objection to its action that it was had near the close of the meeting, and when a portion of the voters had retired. *Bean v. Jay*, 23 Me. (9 Shep.) 117 (1843). Subsequent legal meeting may ratify acts of previous meeting not duly notified. *Jordan v. School District*, 38 Me. 164. By participating in a meeting illegally called, a party is not estopped to deny its legality. *School District v. Atherton*, 12 Met. (Mass.) 105.

either on the same or to a future day, and, if fairly done, to another place within the corporate limits.<sup>1</sup>

§ 270 (208). **Constitution and Meetings of Councils or select Governing Bodies; and herein of Quorums and Majorities, of Integral Parts, and of stated, special, and adjourned Meetings.**— Unlike the towns of New England, in which all the qualified voters meet and act in their primary capacity, the *councils of cities and towns are representative bodies*, the number of whose members is fixed by law, and they are elected by the legal voters of the incorporated place. This council is the governing body of the municipal corporation, and the corporation, unless it is otherwise provided, can act and be bound only through the medium of the council.<sup>2</sup> The *charter or*

<sup>1</sup> Chamberlain v. Dover, 13 Me. (1 Shep.) 466 (1836); People v. Martin, 1 Seld. (5 N. Y.) 22 (1851); Hubbard v. Winsor, 15 Mich. 146; Kimball v. Marshall, 44 N. H. 465 (1863); Drisko v. Columbia, 75 Me. 73; *Ex parte* Wolf, 14 Neb. 24; Goodell v. Baker, 8 Cowen (N. Y.), 286; *infra*, secs. 285, 287. Electors exclusive judges of necessity of adjournment of town meeting; and such adjournment to next day, and at another place, in the town twenty miles distant, was considered lawful. *Ib.* The statute provided that if at any annual town meeting no place is fixed by the electors for the next annual town meeting, such town meeting shall be held at the place of the last annual town meeting. 1 Rev. Sts. N. Y. 340, sec. 3. *Held*, in People v. Martin, 1 Seld. (5 N. Y.) 22, that though the place of meeting was thus contingently fixed by *statute*, the electors, being duly assembled, might adjourn it for the residue of the day to *another* place in the town. Concluding his opinion in this case, Paige, J., well remarks: "I confess that I have had some difficulty in coming to this conclusion, and I think the power [which is decided to exist] of adjourning a town meeting to another time and place, may, under peculiar circumstances, be oppressively exercised, and lead to a defeat of the popular will. This power ought not to be exercised except in a case of extreme necessity." People v. Martin, 1 Seld. (5 N. Y.) 27.

*After a valid adjournment*, acts by a portion of the voters who remain are in-

valid. Kimball v. Lamprey, 19 N. H. 215. In *Massachusetts*, an adjournment of a meeting should appear of record, and parol evidence of an adjournment to another day is held to be inadmissible. Taylor v. Henry, 2 Pick. (Mass.) 397 (1824). See State v. Jersey City, 1 Dutch. (N. J.) 309, and chapter on Corporate Records and Documents, *post*, sec. 298. An adjourned meeting of a meeting not legally called cannot validate the former meeting, nor itself legally act. United States v. McKelden, Vol. VIII. Rep. 1879, McArthur & Mackey, 162; *ante*, sec. 268, note. The *statute of New York* (1 Rev. Sts. 342) only requires the town meeting to be kept open during the daytime, or some part thereof, but not that it shall be kept open during the whole and every part of the day, between the rising and setting of the sun. People v. Martin, 1 Seld. (5 N. Y.) 22 (1851).

<sup>2</sup> Central Bridge Corp. v. Lowell, 15 Gray (Mass.), 106, 116 (1860), where an act affecting a city was, by its terms, to take effect on acceptance by the city, it was held that the acceptance might be made by the governing body. The legislative and corporate powers of a municipality, whose exercise is, by the charter or constituent act, committed to the council or governing body, can be exercised only at a *corporate meeting duly held*; and the corporate will must be ascertained by vote and embodied in a definite form. The form which the corporate will assumes is usually either a resolution or ordinance, or something equivalent thereto.

*constituent act of the place usually contains provisions* as to the constitution of the council, its stated and special meetings, and the notice thereof requisite to be given, how many shall constitute a quorum, and an enumeration of its powers. The usual scheme of the organization of the council is to divide the territory of the incorporated place into districts or wards, the voters in each of which elect one or more representatives, annually, called aldermen or councilmen; and these, when duly convened, constitute the council, over which *the mayor or head executive officer of the corporation presides*, sometimes constituting a member of the council, and in other instances, having power to vote only when there is a tie or to give a second vote in case of a tie.<sup>1</sup>

§ 271 (209). **Mayor's Presence and Function.**—The doctrine of the English courts as to the old corporations in that country, that the *mayor was an integral part* of the corporation, whose presence, unless otherwise provided in the charter, was necessary to a valid corporate meeting; that, during a vacancy in the office of mayor, the corporation could do no valid act, unless expressly empowered, except to elect another and thus complete the body; and that the acts of the corporation under the presidency of any other than a mayor *de jure*, were voidable, has, it is believed, no application to the office of mayor in the corporations of this country.<sup>2</sup>

Schumm v. Seymour, 9 C. E. Green (24 N. J. Eq.), 143; State v. Jersey City, 6 Vroom (35 N. J. L.), 404. See chapter on Ordinances, *post*, sec. 307, note.

<sup>1</sup> Power to preside and give casting vote at meetings of a religious corporation construed. People v. Rector, &c., 48 Barb. (N. Y.) 603. A mayor of a city of the second class in *Kansas* may give the casting vote to confirm an officer appointed by him. Carroll v. Wall, 35 Kan. 36. *Post*, sec. 288, note.

<sup>2</sup> *Infra*, sec. 284. The text approved, Martindale v. Palmer, 52 Ind. 411 (1876); Welch v. Ste. Genevieve, 1 Dillon C. C. 130 (1871). And see *ante*, chap. ix., as to powers and duties of the mayor, secs. 208, 209. A provision in a charter that "the mayor, recorder and aldermen, when assembled together, shall constitute the common council," makes the mayor a member of the council. People v. Harshaw, 60 Mich. 200. *Infra*, sec. 273.

The presiding officer of a town meeting, with statute authority to maintain order,

may make a valid order, though it be by parol only, for the removal of a *disorderly person* who disturbs the business of the meeting. Parsons v. Brainard, 17 Wend. (N. Y.) 522 (1837). Approval by the *mayor of proceedings* of the council may, by special requirement of charter, be essential to their validity. Graham v. Carondolet, 33 Mo. 262 (1862); Kepner v. Commonwealth, 40 Pa. St. 124. A charter required every resolution of the council to be sent to the mayor, who should either approve it, in which case it would become operative and effectual, or disapprove it, in which case he should return it. It was held that his approval was to be made known by a written declaration attested by his signature. N. Y., &c. R. Co. v. Waterbury, 55 Conn. 19. *When approval by mayor not necessary.* State v. Jersey City, 1 Vroom (30 N. J. L.), 93, 148; see Dey v. Jersey City, 19 N. J. Eq. 412; Taylor v. Palmer, 31 Cal. 241; State v. Newark, 1 Dutch. (N. J.) 399; *post*, sec. 331, note.

§ 272 (210). **Same subject.** — The *right of the mayor* or other officer to *preside* over the meeting of the council is a *franchise*, and may be tested by an information in the nature of a *quo warranto*,<sup>1</sup> but cannot be determined, at least ordinarily, unless by statute provision, *on a bill in chancery* to enjoin, or in any other indirect or collateral proceeding.<sup>2</sup>

§ 273 (211). **Constitution of Council.** — Who shall *compose the council* or governing body of the corporation is in all cases prescribed by the charter or incorporation act, but the language used has been such as sometimes to lead to controversy.<sup>3</sup> The organic act of a city provided "that the intendant of police shall have a seat in the board of commissioners [the governing body of a city corporation], and when present shall preside therein; *in his absence*, the board shall appoint a chairman *pro tempore*." It was held that the intendant was thereby constituted one of the commissioners, and had the right to participate in making ordinances.<sup>4</sup> Where the power to legislate

<sup>1</sup> *Cochran v. McCleary*, 22 Iowa, 75 (1867), and authorities there cited; *Re Sawyer*, 124 U. S. 200 (1887); *Reynolds v. Baldwin*, 1 La. An. 162 (1846); *Rex v. Williams*, 1 Burr. 402; Willc. 456, pl. 337; *Rex v. Hertford*, 1 Ld. Raym. 426; approved, *Commonwealth v. Arrison*, 15 Serg. & Rawle (Pa.), 130; *ante*, chap. ix. sec. 208. In *Cochran v. McCleary*, *supra*, it was held that the mayor, in cities of the second class, organized under the General Incorporation Act (Rev. of Iowa, 1860, chap. li.), is not *ex officio* a member of, nor has he any right to preside over, the city council; that the council was composed exclusively of trustees or aldermen, and elected its own presiding officer. The mayor of *New York* was held not to be a member of the common council; and the common council, having the power by statute to appoint to office, may exercise it without the concurrence of the mayor, who has no veto power upon the appointment. *Achley's case*, 4 Abb. Pr. Rep. 35 (1856). The burgess of a borough incorporated under the Pennsylvania General Borough Law of 1851 has no right to act as a member of the town council, and cannot refuse to sign ordinances regularly passed by the town council, on the ground that he was not present as a member when they were adopted. *Commonwealth v. Kepner*, 10 Phila. (Pa.) 510.

<sup>2</sup> *Cochran v. McCleary*, 22 Iowa, 75, 86 (1867); *Re Sawyer*, 124 U. S. 200 (1887); *post*, chap. xxii.; *Topping v. Gray*, 7 Hill (N. Y.), 259; affirming s. c. 9 Paige, 507; *Markle v. Wright*, 13 Ind. 548; *Hullman v. Honcomp*, 5 Ohio, 237; *People v. Cook*, 4 Seld. (9 N. Y.) 67; affirming s. c. 14 Barb. 257; *Mayor v. Conner*, 5 Ind. 171; *Mozley v. Alston*, 1 Phill. 790; *Lord v. The Governor, &c.*, 2 Phill. 740; *Peabody v. Flint*, 6 Allen (Mass.), 52; *Hagner v. Heyberger*, 7 Watts & Serg. (Pa.) 104; *People v. Carpenter*, 24 N. Y. 86; *People v. Draper*, 15 N. Y. 532; *People v. Insurance Co.*, 2 Johns. Ch. 371; *People v. Same Co. (quo warranto)*, 15 Johns. 358; *Demarest v. Wickham, Mayor, &c.*, 63 N. Y. 320 (1875); *Commonwealth v. Bank (quo warranto)*, 28 Pa. St. 389; in *chancery*, *ib.* 379; *Hughes v. Parker*, 20 N. H. 58; *Strahl, In re*, 16 Iowa, 369; *Updegraff v. Crans*, 47 Pa. St. 103; *Facey v. Fuller*, 13 Mich. 527; see *Kerr v. Trego*, 47 Pa. St. 292, cited *infra*, sec. 275.

<sup>3</sup> *Cochran v. McCleary*, 22 Iowa, 75 (1867).

<sup>4</sup> *Raleigh v. Sorrell*, 1 Jones (N. C.) Law, 49 (1853). In this case the Supreme Court of North Carolina admit (*arguendo*) that an officer — as, for example, the intendant — has no right, under the act of incorporation, to sit



for the corporation is vested in "the mayor and councilmen," the council by itself cannot legislate, but must act in conjunction with the mayor. In deciding the point the court observes: "If a simple resolution [instead of an ordinance] would be sufficient, yet, before it would have any validity, it would necessarily have to be signed by the mayor as a part of the law-making power: the co-ordinate action of both is required."<sup>1</sup>

§ 274 (212). **Proper Corporate Body must act.**—It is undoubtedly true, as already stated, that *the corporate authority must be exercised by the proper body*. Thus, where a town was organized under a charter which vested the corporate powers of the place in a president and six trustees, and subsequently a general incorporation act was passed which was erroneously supposed to apply to the town, and under which the town elected different officers from those provided in the special charter, at a different time and constituting a different body, it was held, in the absence of legislative ratification, that this latter body could not exercise the authority of the corporation, since they were a body without any legal existence, and were not the body authorized to act for the corporation. The principle that *the acts of de facto officers are valid* was considered not to be applicable.<sup>2</sup>

with the legislative body of the corporation; but if he does so and acts with them, that an ordinance thus passed will be void, because the powers given to the corporation must be exercised in strict conformity to the special delegation of authority, and because, in the case supposed, the ordinance is not passed by the body to which the power is given; citing *Rex v. Croke*, Cowp. 26. The view of the court is in accordance with the rule of the English courts as applied to their corporations. Thus, Mr. Willcock says: "It may be unnecessary to add that whenever a particular business is delegated to a select body, if others join in the performance of it, the act is void; as if the mayor, aldermen, and commonalty join in making a by-law which is directed to be made by the mayor and aldermen. For if others are allowed to vote, a by-law might be established, although all those to whom the power is specifically delegated should be in the minority." Corp. 68, pl. 128; *Parry v. Berry*, Comyns, 269; *Rex v. Head*, 4 Burr. 2521; *Hoblyn v. Regem*, 2

Bro. P. C. 329; *Rex v. Westwood*, 4 B. & C. 799, 818; *Green v. Durham*, 1 Burr. 131; see *post*, sec. 276, and note. Whether the mere fact that a single unauthorized person is, by a mistaken construction of the charter, allowed to participate in the transactions of a meeting of the council, would, in this country, be held necessarily to avoid them, is a question which perhaps remains yet to be settled. It has been held, that if persons who are not qualified vote at a town, parish, or district meeting, without objection or challenge at the time, proof of that fact cannot afterwards be made with a view to invalidate the proceedings. *Sutton v. Cole*, 3 Pick. (Mass.) 232 (1825). So if such a meeting is called by persons acting under color of authority, it will be legal if no exception to their authority is taken at the time. *Id.*

<sup>1</sup> *Saxton v. Beach*, 50 Mo. 488 (1872), *per Wagner*, J. Sequel of the case, *Saxton v. St. Joseph*, 60 Mo. 153 (1875). *Ante*, sec. 271, note.

<sup>2</sup> *Decorah v. Bullis*, 25 Iowa, 12 (1868);

§ 275 (213). **Injunction where two conflicting Municipal Bodies are concurrently acting.** — Where there are two bodies, *each of which claims to be the regularly organized municipal council and each is acting as such*, to the detriment and confusion of the public, the Supreme Court of Pennsylvania awarded to the body which was, *prima facie*, legally entitled to act, a provisional injunction to restrain the other body from interference with them. The bill in the case was filed by the body which, *prima facie*, had the written or legal title, as against the other and presumptively usurping body. Neither the Attorney-General nor any public officer was a party. To the defendants' objection that in such a case the Attorney-General alone can file a bill, the court replied: "We do not think so. It is right for those to whom public functions are entrusted to see that they are not to be usurped by others."<sup>1</sup>

Welch v. Ste. Genevieve, 1 Dillon C. C. 130 (1871); *infra*, sec. 276.

<sup>1</sup> Kerr v. Trego, 47 Pa. St. 292 (1864). *Author's Comments.* In reference to the important point decided in the case just cited it may be observed that, in the absence of statute, chancery has no jurisdiction over corporate elections, or to determine the title to corporate offices. In a case like that above mentioned, prompt and efficacious judicial intervention such as chancery only can afford is extremely convenient, or even needful, but the difficulty is to find, aside from statutory aid, an acknowledged head of equitable jurisdiction under which such a case can be brought. The general doctrine of our jurisprudence undoubtedly is that which is thus stated by Gray, J., *In re Sawyer*, 124 U. S. 212 (1887): "The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error, or appeal, or by *mandamus*, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case and the mode of procedure established by the common law or by statute. No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. In the courts of the several States such a power in a court of equity has been denied in many well-considered cases," citing them.

In Kerr v. Trego, *supra*, the Supreme

Court of Pennsylvania rested the right to grant a provisional injunction upon the ground, very broadly stated, that all corporate bodies and officers are *under law* and that "this remedy [by injunction] extends to all acts that are contrary to law and for which there is no adequate remedy at law; and we can hardly imagine any act that more clearly falls within this description than one that casts so deep a shade of doubt and confusion on the public affairs of a city as this does. In such a case no remedy is adequate that is not prompt and speedy." Similar views are expressed in the dissenting opinion of Waite, C. J., *In re Sawyer*, 124 U. S. 223. The stress of the question therefore is, whether the jurisdiction in equity is to be strictly limited by the existing landmarks and to the acknowledged heads of that jurisdiction, or whether, agreeably to the principles in which one source of equity jurisdiction has had its origin, namely, the inadequacy of common-law remedies, the jurisdiction of the court may, by a species of judicial legislation which, consciously or otherwise, is always in operation, be extended to a case of such an urgent and extraordinary nature as that which was presented by the facts in Kerr v. Trego. On the whole it seems to the author that Kerr v. Trego may be regarded as a sound, or at least an allowable, application of the principles of equity jurisdiction to a case of great public urgency, where, under the legislation of

§ 276 (214). **Acts of de facto Councils and Officers.** — In this country the doctrine is everywhere declared, that the acts of *de facto* officers, as distinguished from the acts of mere usurpers, are *valid*, and the principle extends not only to municipal officers generally, but also to those composing the council, or legislative or governing body of a municipal corporation.<sup>1</sup> But in order that there may be,

the State as it existed in Pennsylvania, the common-law remedies were not only inadequate, but wholly unsuited to the emergency in hand. The temptation to supply serious defects and *lacunae* which experience from time to time discloses in common-law remedies, by a judicial extension of the principles of equity jurisdiction, so as to secure justice or prevent its failure, is always strong, and on the whole resistless. A conservative chancellor may say here and there, "I have no power — the case is one for the legislature;" but the natural and general tendency when such a course is not contrary to existing legislation or policy, is to assert in the particular case a power felt to be necessary, and whose exercise promises to be beneficial. This, it is true, is judiciary law; but it is law which is necessarily evolved in the very process of legal administration. So it has been in the past, and so from the very nature of the case it must continue in the future. Law thus originating in actual experience, and limited by the judges in its application to the exigency which calls it into existence, must on the whole be excellent, though likely to be incomplete. It will be observed that the court did not undertake on the bill filed to adjudge the questions of title between the conflicting bodies. It disclaimed the right to do so. Its injunction, granted in the public interest, simply maintained the existing *prima facie* legal status until the question of title should be determined in the usual mode and by the proper tribunals. *Demarest v. Wickham*, Mayor, 63 N. Y. 320 (1875), was an action by two assistant aldermen in their own names to restrain the defendant, as mayor, from recognizing the board of aldermen, organized as the common council and usurping the rights of the board of assistant aldermen, of which the plaintiffs were members, on the ground that they had usurped the office in question, having been elected

under an alleged unconstitutional act, and to restrain this alleged illegal and usurping body from the exercise of unauthorized powers. It was held that the action could not be maintained, and that the remedy under the legislation of New York was an information in the nature of a *quo warranto* by the Attorney-General in the name of the State. The case is distinguishable from *Kerr v. Trego*. Mode of organizing councils to which new members are to be admitted, and tests in case of conflicting councils, for determining which is the legal organization. *Kerr v. Trego*, 47 Pa. St. 292; *supra*, secs. 202, note, 204, 255, note, 272.

<sup>1</sup> *Seoville v. Cleveland*, 1 Ohio St. 126 (1853); *Decorah v. Bullis*, 25 Iowa, 12 (1868); *Cochran v. McCleary*, 22 Iowa, 75, 84; *Strahl, In re*, 16 Iowa, 360; *People v. Stevens*, 5 Hill (N. Y.), 616; *State v. Jacobs*, 17 Ohio, 143; *People v. Bartlett*, 6 Wend. (N. Y.) 422; *Pritchett v. People*, 1 Gilm. (6 Ill.) 529; *People v. Runkle*, 9 Johns. (N. Y.) 147; *Trustees, &c. v. Hill*, 6 Cow. (N. Y.) 23; *Williams v. School District*, 21 Pick. 75; see *Rex v. Mayor, &c.*, 8 Mod. 111; *DeGrave v. Monmouth*, 4 Car. & P. 111; *Laver v. McGlachlin*, 28 Wis. 364; *post*, sec. 892, note; *Cushing v. Frankfort*, 57 Me. 541; *Lockhart v. Troy*, 48 Ala. 579 (1872); *Riddle v. Bedford*, 7 S. & R. (Pa.) 386; *People v. Hopson*, 1 Denio (N. Y.), 574; *Hamlin v. Dingman*, 5 Lans. (N. Y.) 61; *People v. Nostrand*, 46 N. Y. 375; *Olmsted v. Dennis*, 77 N. Y. 378; *Koontz v. Hancock*, 64 Md. 134. As to *de facto* officers, *ante*, secs. 197 note, 221 note, 256, *post*, 763 note, 892 note. In a case in the House of Lords, decided in 1851, it was held that an act done by a definite body, under authority of parliament, was not invalid because officers *de facto* joined with officers *de jure* in the doing of it. The judges having unanimously declared this to be their opinion, the Lord Chancellor said: The opinion of the judges as to

within the meaning of the above rule, a *de facto* officer, there must be a *de jure* office; and the notion that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law; and, therefore, a person cannot claim to be a *de facto* officer of a municipal corporation when the corporation or people have, in law, no power, in any event, to elect or appoint such an officer.<sup>1</sup>

§ 277 (215). **Action by Indefinite Body; Majority present may act.**—The common-law principle, that if an *act is to be done by an indefinite body* it is valid if passed by a majority of those present at a legal meeting, no matter how small a portion they may constitute of the whole number entitled to be present, has been deemed *applicable to the towns of New England*. In those towns the corporate power resides, as we have seen, in the inhabitants, or citizens at large, and these form the constituent body. If the meeting has been duly called and warned, those who assemble, *though less than a majority of the whole*, have the power to act for and bind the whole, unless it is otherwise provided by law. Those who remain away are justly and conclusively presumed to assent to what may lawfully be done by those who attend.<sup>2</sup>

vestrymen *de facto* and *de jure* was of great importance. When it was considered that there were many persons who were charged with very important duties, and whose title to perform those duties or to exercise the powers necessary for their performance the public could not easily ascertain at the time, and when it was remembered what inconveniences would arise if the validity of their acts depended on the propriety of the election of the persons who had to perform them, the value of the clear enunciation of the principle thus made by the judges was very great, and in the correctness of it he begged to declare his entire concurrence. *Scadding v. Lorant*, 5 Eng. Law & Eq. 16, 30, *per* Lord Chancellor *Truro*. See *ante*, sec. 273, note. A person *acting in the capacity of a public officer is prima facie* taken to be so. *Doe v. Barnes*, 8 Q. B. 1043; *Regina v. Roberts* (crown cases reserved), 36 Law Times Rep. 690; s. c. 6 Am. Law Rep. 414. *Ante*, sec. 237, note, as to powers, duties, and liabilities of public officers.

<sup>1</sup> *Decorah v. Bullis*, 25 Iowa, 15, 18,

(1868); *Hildreth's Heirs v. McIntire's Devises*, 1 J. J. Marsh. (Ky.) 206; *People v. White*, 24 Wend. (N. Y.) 520, 540, 541; *Carleton v. People*, 10 Mich. 250; *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130 (1871). In *Norton v. Shelby Co.*, 118 U. S. 425 (1885), the doctrine of the text was asserted and enforced as sound. Mr. Justice *Field* reviews the cases, and distinguishes *The State v. Carroll*, 38 Conn. 449. See *post*, chap. xiv.; *Burt v. Winona & St. Peter Ry. Co.*, 31 Minn. 472 (approving text). *De facto* officer's official bond not obligatory there being no such *de jure* office. *Tinsley v. Kirby*, 17 S. C. 1, 8; *supra*, sec. 274; *post*, chap. xxi.; sec. 892.

<sup>2</sup> *Damon v. Granby*, 2 Pick. (Mass.) 345, 355 (1824); *Commonwealth v. Ipswich*, 2 Pick. (Mass.) 70; *Williams v. Lunenburg*, 21 Pick. (Mass.) 75; *Church Case*, 5 Robt. (N. Y.) 649 (1867); *First Parish v. Stearns*, 21 Pick. (Mass.) 148 (1838); *State v. Binder*, 38 Mo. 450 (1866).

At a popular election, a candidate for a municipal office received a *plurality* of all

§ 278 (216). **Quorum and Majority of Definite Body.** — The common-law rules as to *quorums* and *majorities*, established with reference to corporate bodies consisting of a *definite number* of corporators, have also, in general, been applied to the common council, or select governing body of our municipal corporations, where the matter is not specially regulated by the charter or statute.<sup>1</sup> Thus, to use Mr. Dane's illustration, if the body consists of twelve common councilmen, seven is the least number that can constitute a valid meeting, though four of the seven [the seven being duly assembled and present] may act.<sup>2</sup> Thus, where a council consisted of eighteen members, exclusive of the mayor, the election of a clerk by nine votes was held lawful and valid, the other members remaining present, though protesting against the method of electing and refusing to vote. It was held that the legal effect of their refusal to vote while remaining present, was an acquiescence in the action of those voting.<sup>3</sup> So, also, a statute in reference to a definite body, declaring that a "*majority of those present at any regular meeting shall be competent*" to transact business, leaves the number which may form a *quorum* to be determined by the common law; that is, there must be at least a majority present, and such a provision, it was considered, did not authorize a *minority of the whole body* to act.<sup>4</sup>

the votes cast, but not a majority. There was no provision of the charter and no by-law on the subject. The usage in the corporation seemed to have been to consider the person having the highest number of votes, although not a majority of the whole, as duly elected. The statute in relation to *State* elections expressly provided that "plurality, or the highest number of votes, should make a choice." Under these circumstances, the majority of the court were of the opinion that the common-law rule, that a *majority* is necessary to a valid election, applied, and was not controlled by the terms or spirit of the general election law of the State. *State v. Wilmington*, 3 Harring. (Del.) 294 (1840). *Harrington, J.*, dissented, holding (and, as it would seem, with reason) that the plurality principle had been the one "invariably adopted as most in consonance with our institutions in all cases where the law of election is silent in this respect." *Ib.*, p. 305. See *First Parish v. Stearns*, 21 Pick. (Mass.) 148.

*As to municipal elections. Ante*, chap. ix. sec. 196.

<sup>1</sup> Text approved in *Heiskell v. Baltimore*, 65 Md. 125, where *Stone, J.*, said: "But when in the case, like the present, of a municipal corporation, the statute law creating it is silent as to what shall constitute a legal assembly, the common law both in England and in this country is well settled, that the *majority* of the members elect shall constitute the legal body." To same effect, *Barnert v. Pater-son*, 48 N. J. L. (19 Vroom) 395; *Cadmus v. Farr*, 47 N. J. L. (18 Vroom) 208; *McDermott v. Miller*, 45 N. J. L. 251.

<sup>2</sup> 5 Dane, Abr. 150; *Willcocks, In re*, 7 Cow. (N. Y.) 402, 410 (1827), note *d*, and criticism on the rule stated, in 1 *Kyd on Corp.* 418, 425; 2 *Kent Com.* 293; *Buell v. Buckingham*, 16 Iowa, 284 (1864); *Regents, &c. v. Williams*, 9 Gill & Johns. (Md.) 365; *Mills v. Gleason*, 11 Wis. 470.

<sup>3</sup> *State v. Green*, 37 Ohio St. 227.

<sup>4</sup> *Willcocks, In re*, 7 Cow. (N. Y.) 402 (1827); *Ib.* 463, and note; *Ib.* 526,

§ 279 (217). **Same subject. Quorum.** — So, if a board of village trustees consists of *five members, and all, or four, are present, two* can do no valid act, even though the others are disqualified by interest from voting, and therefore omit or decline to vote; their assenting to the measure voted for by the two will not make it valid. If three only were present they would constitute a quorum; then the votes of two, being a majority of the quorum, would be valid;<sup>1</sup> certainly so where the three are all competent to act.<sup>2</sup>

§ 280 (218). **Legal Quorum defined.** — In another case, the power of amotion was conferred upon a city council to be exercised "*by a vote of two-thirds of that body,*" and this was considered to give the power of removal to two-thirds of a legal quorum. Two-thirds of the whole number of members composing the council were held not to be required. The point was admitted to be close, and the French text of the charter was regarded as favoring the conclusion reached.<sup>3</sup>

§ 281 (219). **Quorum under Special Charter Provision.** — The charter of a city contained a provision that no ordinance should be passed by the common council, except by a *majority of all the members elected*. Eight were elected; and it was decided, under the above-mentioned requirement of the charter, that an ordinance could not be passed by a vote of *four* against three, since four did not constitute a majority of all the members elected, although it did constitute a majority of the legal quorum present at the meeting.<sup>4</sup>

§ 282 (220). **Majority of Quorum must concur.** — In the absence of special provision, the *major part of those present*, at a meeting of a select body, *must concur* in order to do any valid act. Therefore, when it appeared that thirteen ballots were cast when the members

and note; *Heiskell v. Baltimore*, 65 Md. 125; *Barnert v. Paterson*, 48 N. J. L. 395; *ante*, sec. 207, note; *infra*, secs. 282, 283. In *Iowa*, by statute "all ordinances and resolutions, or orders for the *appropriation or payment of money* shall require for their passage or adoption the concurrence of a majority of all the trustees of any municipal corporation," &c. A resolution for a change of the boundaries of a city does not require such majority concurrence. *Strohm v. Iowa City*, 47 Iowa, 42. Authorizing a city council to "settle their rules of procedure" held not to confer upon it the power of declaring what number shall con-

stitute a quorum. *Heiskell v. Baltimore*, 65 Md. 125; *Barnert v. Paterson*, 48 N. J. L. 395.

<sup>1</sup> *Coles v. Williamsburgh*, 10 Wend. (N. Y.) 658 (1833); *McDermott v. Miller*, 45 N. J. L. (16 Vroom) 251.

<sup>2</sup> *Buell v. Buckingham*, 16 Iowa, 284 (1864), and cases cited. *Post*, sec. 292, n.

<sup>3</sup> *Warnock v. Lafayette*, 4 La. An. 419. See, on this point, *Logansport v. Legg*, 20 Ind. 315; *State v. Porter*, 113 Ind. 79.

<sup>4</sup> *San Francisco v. Hazen*, 5 Cal. 169 (1855). See, also, *Oakland v. Carpentier*, 13 Cal. 540; *McCracken v. San Francisco*, 16 Cal. 591; *Pimental v. San Francisco*, 21 Cal. 351.

present were only entitled to give twelve votes, of which seven were for one person and six for another, there was no election, and the council, though it had declared that the person receiving seven votes was duly elected, might subsequently rescind its action and proceed to a new election.<sup>1</sup> And in South Carolina the general rule is recognized, and a *majority* of the board of managers of elections—having power, by statute, to determine the validity of contested elections—is a quorum, and a majority of that quorum may act and decide.<sup>2</sup>

§ 283 (221). **Extent of the Majority Principle ; application to Committees, Public Officers, &c.**—And, as a *general rule*, it may be stated that not only where the corporate power resides in a *select body*, as a city council, but where it has been *delegated to a committee or to agents*, then, in the absence of special provisions otherwise, a *minority* of the select body, or of the committee or agents, are powerless to bind the majority or do any valid act. If all the members of the select body or committee, or if all the agents are assembled, or if *all* have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such case, a major part of the whole is necessary to constitute a quorum and a majority of the quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease.<sup>3</sup> But where the *duties are purely ministerial, and not judicial*, or are of such a nature as to *exclude the idea of action as a body or board*, and where they are devolved on *public officers* or agents rather than on the agents of corporations, the rule above stated (as the cases

<sup>1</sup> *Labourdette v. Municipality*, 2 La. An. 527 (1847).

<sup>2</sup> *State v. Delieusseline*, 1 McCord (S. C.), 52 (1821), where the subject is elaborately considered by *Nott, J.*; *s. p.* *State v. Huggins, Harper* (S. C.) Law, 94 (1824), further holding that where, of eighteen managers appointed by the legislature, two refused to qualify, one was disqualified, and one dead, the remaining fourteen (from necessity and public convenience) properly constituted the board, and might act by a majority of the fourteen. The decision rests upon the legislative intent, deduced from various provisions of the act, to commit the matter to the *acting managers*.

<sup>3</sup> *Kingsbury v. School District*, 12 Met. (Mass.) 99 (1846); *Day v. Green*, 4 Cush. (Mass.) 438, 439 (1849); *Fisher v. School District*, 4 Cush. (Mass.) 494 (1849); *Coffin v. Nantucket*, 5 Cush. (Mass.) 269 (1850); 11 Cush. 433; *Damon v. Granby*, 2 Pick. (Mass.) 345, 355 (1824); *State v. Jersey City*, 3 Dutch. (N. J.) 493; *Charles v. Hoboken*, 3 Dutch. (N. J.) 203; *Dey v. Jersey City*, 19 N. J. Eq. 412 (1869); *Baltimore v. Poultney*, 25 Md. 18 (1866). Text quoted and approved, *Brown v. District of Columbia*, 127 U. S. 579, 586 (1887).

below referred to will show) has been relaxed, and in some instances deemed to be wholly inapplicable.<sup>1</sup>

<sup>1</sup> With respect to persons or officers appointed by law to act *judicially* in a public matter, it is generally held, there being no provision of statute to the contrary, that where *all meet* and act, a majority may decide and bind the rest, and this notwithstanding the express dissent of the minority, or their wrongful withdrawal before the act is consummated. *Rogers, In re*, 7 Cow. (N. Y.) 526 (1827) (appraisal of damages by canal appraisers), and see *Ib.* note *a*, and the cases there cited and reviewed; *Ib.* 764, explanation. See, further, Willcocks, *In re*, 7 Cow. (N. Y.) 402, and note; *Ib.* 462, 463; *Young v. Buckingham*, 5 Ohio, 485, 489 (1832); *Charles v. Hoboken*, 3 Dutch. (N. J.) 203; *Martin v. Lemon*, 26 Conn. 192 (1857); *Astor v. New York*, 62 N. Y. 567, 580 (1875); *People v. Palmer* (effect of death of one of the members or officers), 52 N. Y. 83; *People v. Syracuse*, 63 N. Y. 291; *ante*, sec. 99, note; *post*, chap. xxiii.

The statute authorized the appointment of three levee inspectors, and prescribed their duties, which involved the exercise of judgment. *Held*, that all must meet and act, and that the action of a majority in the absence of the third was void. *Ballard v. Davis*, 31 Miss. 525 (1856).

Where a majority of a committee is authorized to act, they constitute a party capable of contracting; and another member of a committee, not acting as such, but as an individual, constitutes another party capable of being contracted with. It is accordingly held that a majority of such a committee may contract with or employ one of their own number, and such contract, if fairly made and without fraud or corruption, will be binding upon the corporation. *Junkins v. Union School District*, 39 Me. 220; *Buell v. Buckingham*, 16 Iowa, 284; *post*, sec. 443, note; *post*, sec. 292; *Willard v. Newburyport*, 12 Pick. (Mass.) 227. Compare *Smith v. Albany*, 61 N. Y. 444 (1875). But a contract made by less than a majority of a committee of the corporation, though in the name of the whole, binds neither

party. *Post*, sec. 452. But it will be binding if the authority was joint and several, or if ratified. *Adams v. Hill*, 16 Me. (4 Shep.) 215 (1839); *Kupfer v. South Parish, &c.*, 12 Mass. 185 (1815); *Allen v. Cooper*, 22 Me. 133 (1842). In *Damon v. Granby*, 2 Pick. (Mass.) 345 (1842), this distinction is taken. If a public corporation appoints a committee of its own members, a majority may bind, for such is the usage and the common law in relation to corporations. But if the authority is given to persons not members of the body, such persons are agents, and not technically a committee, and all must concur, unless it appear that it was intended that a majority should act. See authorities cited by Solicitor-General Davis in same case, p. 350; *Viner's Ab. title Authority*, B. pl. 7. Further as to binding force of the act of majority of a committee or board of selectmen, see *Jones v. Andover*, 9 Pick. (Mass.) 146; *Crommett v. Pearson*, 18 Me. (6 Shep.) 344 (1841); *Junkins v. School District*, 39 Me. 220 (1855); *Inhabitants, &c. v. Cole*, 3 Pick. (Mass.) 232, 244; *Kingsbury v. School District*, 12 Met. (Mass.) 99 (1846); *Keyes v. Westford*, 17 Pick. (Mass.) 273 (1835); *Green v. Miller*, 6 Johns. (N. Y.) 39 (1810); *Grindley v. Barker*, 1 Bos. & Pul. 236, *per Eyre, C. J.*; *King v. Beeston*, 3 Term R. 592; *Guthrie v. Armstrong*, 5 Barn. & Ald. 628 (1822), where it was held that a power given to fifteen jointly and severally was well executed by four. A school committee appointed according to and under a statute are public officers within the meaning of the statute which gives a majority of such officers authority to act for the whole. *Keyser v. School District*, 35 N. H. 477 (1857). Where an authority is given, by law, to a committee, or to more persons than one, to do an act of a public nature, one alone, unless there be something to show such intention, cannot act independently and without the concurrence of the others, or at least of a majority. If the act is ministerial, a majority at least must concur: but unless required, or such is the practice, they need not act as a board, and be convened or



§ 284 (222). **Application of Majority Principle to Joint Assemblies.**

—The doctrine of the English courts is, that *all of the integral parts* of a corporation necessary to do an act must not only meet, but

notified to be convened as such. But if the act is *judicial* in its nature, that is, requiring the exercise of judgment, unless special provision is otherwise made, all must meet or have notice to meet, a majority will constitute a quorum, and a majority of the quorum will be competent to act. *Martin v. Lemon*, 26 Conn. 192 (1857). In this case it was ruled that one of a committee of three to remove encroachments on highways could not act alone. *Committees of public corporations* have sometimes been held to be governed, with respect to meeting and notice, by different rules from a board which has necessarily to be assembled or convened before it can act. And the acts of a majority of such committees have been considered valid, though some member of the committee was not notified. *Gallup v. Tracy* (town committee to stake out oyster grounds), 25 Conn. 10 (1856). But compare *Martin v. Lemon*, 26 Conn. 192. And see *Damon v. Granby*, 2 Pick. (Mass.) 345, 354; *Grindley v. Barker*, 1 Bos. & Pul. 229; *Keeler v. Frost*, 22 Barb. (N. Y.) 400; *Perry v. Tynen*, 22 Barb. (N. Y.) 137. Town committee held to be an agent of the town, and not a board of public officers or a judicial body, and may act by the agreement of the individual members separately obtained. *Shea v. Milford*, 145 Mass. 528 (1888); *Haven v. Lowell*, 5 Met. (Mass.) 35. Where a public authority is to be exercised by two officers — a number not admitting of a majority — regularly, both should act; yet, to prevent a failure of justice, it seems one may, in certain cases, as where the other is dead, disqualified, or absent, act alone. But certain it is, that where one only acts, the consent of the other will be presumed. This is an application of the strong presumption which obtains in favor of the performance of official duty. *Downing v. Rugar*, 21 Wend. (N. Y.) 178 (1839), and authorities cited. This case also holds that the presumption of consent should be rebutted only by the testimony of the other officer.

*Ib.* 185. "It is a general principle that where a board of officers (for example, overseers of the poor) is constituted to perform a duty provided by law, the act of the majority is the act of the whole body." *Per Bennett, J., Walcott v. Walcott*, 19 Vt. 37, 39 (1846). See, also, *King v. Beesten*, 3 Term R. 592; *Jones v. Andover*, 9 Pick. (Mass.) 146.

Under the statutes of Pennsylvania, all powers conferred upon county commissioners may be legally executed by two without the concurrence of the third. *Commissioners v. Leckey*, 6 Serg. & Rawle (Pa.), 166; *Cooper v. Lampeter*, 8 Watts (Pa.), 128; *Curtis v. Butler Co.*, 24 How. 435; *Jefferson Co. v. Slagle*, 66 Pa. St. 202, where it is held that a contract by two county commissioners within the scope of their authority bound the county, although not made at their office.

Where three commissioners are appointed to contract for site for poor-house, two of them cannot make a valid purchase. *Pulaski Co. v. Lincoln*, 4 Eng. (9 Ark.) 320 (1849). Action of less than a majority of commissioners of public buildings, appointed by act of legislature, is void. *Petrie v. Doe*, 30 Miss. 698 (1856). A statute declaring that every board of township trustees, "and the members thereof," shall be overseers of the poor was construed to make each member an overseer, with power to act. *County Commissioners v. Jones*, 7 Ind. 3, 5 (1855).

*When majority may lawfully execute powers of a public nature.* *Commissioners v. Leckey*, 6 Serg. & Rawle (Pa.), 170; *Baltimore Turnpike*, 5 Binn. (Pa.) 484; *McCready v. Guardians*, 9 Serg. & Rawle (Pa.), 99; *Commonwealth v. Commissioners*, 9 Watts (Pa.), 466, 471; *Cooper v. Lampeter*, 8 Watts (Pa.), 128; *Caldwell v. Harrison*, 11 Ala. 755; *Commissioners v. Tarver*, 21 Ala. 661; *Orist v. Town Trustees*, 10 Ind. 462; *Somerset v. Parson*, 105 Pa. St. 360; *Schenck v. Peay*, 1 Dillon C. C. R. 267.

*remain present till the act is completed*; and therefore if one of such parts deserts or withdraws, though wrongfully and to defeat any action, before the act is consummated, the act is not valid.<sup>1</sup> The liability of this rule to abuse, since it enables one of the parts of a joint meeting or assembly to defeat any action whatever, has led the courts in this country to deny its applicability here, or to apply it with caution.<sup>2</sup>

<sup>1</sup> *King v. Williams*, 2 Maule & Selw. 141; following *King v. Buller*, 8 East, 389; questioning *King v. Norris*, 1 Barnard. K. B. 385; cited and reviewed, 7 Cow. 526, note; *King v. Miller*, 6 Term R. 278; 2 Kent's Com. 292. Mr. Willcock vindicates the rule, but on grounds not very satisfactory. Corp. 53, 54. *Supra*, sec. 271.

<sup>2</sup> *Humphrey, In re*, 10 Wend. N. Y. 612 (1884); *People v. Batchelor*, 22 N. Y. 128, 146; *per Denio, J.*; *First Parish v. Stearns*, 21 Pick. (Mass.) 148 (1838); *Coles Co. v. Allison*, 23 Ill. 437. *Ante*, sec. 271.

The common-law rule, that to the *due constitution of a corporate assembly a majority*, at least, of each integral or component part or body must necessarily be present, was departed from by the Supreme Court of *New Hampshire* in the case of *Beck v. Hanscom*. By the charter, the city government of Portsmouth was vested in a mayor, "one council of seven, to be denominated the board of aldermen, and one council of twenty-one, to be denominated the common council, which boards should, in their joint capacity, be denominated the city council." It was further provided by the charter that a "majority of each board shall constitute a quorum;" that the two bodies shall sit and act separately, except "when the two are required to meet in convention;" that at the meeting of the "city council in convention, if it shall appear that a majority of either of said bodies is not present," the members may compel the attendance of the absentees, &c. The board of aldermen and the common council separately voted to meet in convention on the 12th of June, for the choice of city officers; but when the time arrived, only a minority (three out of seven) of the board of aldermen appeared. The com-

mon council and these aldermen, twenty-three in all, being a majority of both boards, proceeded to elect city officers; and it was held, 1st, that the election was valid; and 2d, that a majority of the twenty-three present could elect. In reference to this decision it may be observed that the court take no notice of the power of compelling the attendance of the absentees, and that this provision seemed to contemplate the presence of a majority of *each* of the constituent bodies. The court cite and approve *Whiteside v. People*, 26 Wend. 634, and *Humphrey, In re*, 10 Wend. 612; in both of which, however, the constituent bodies, so to call them, duly met, but refused to act. It is substantially admitted by the court that the decision they make is not in conformity with the English rule, but they consider it to be the one "which will best enable the government of the city to proceed with regularity;" and that "after every preliminary step has been properly taken, the mere neglect of one of the constituent bodies to carry its previous vote into effect ought not to hinder the other bodies from performing the duties required by the charter." *Per Gilchrist, C. J.*, in *Beck v. Hanscom, supra*, 9 Fost. (29 N. H.) 213, 226. In *Kimball v. Marshall*, 44 N. H. 465 (1863), *Bell v. Hanscom, supra*, is approved, and its doctrine applied to a different state of facts.

Effect of refusal of one of two distinct bodies to go into a joint meeting, or, after being assembled in joint meeting, to participate in "the joint ballot" by which officers (by statute) are to be removed or appointed, see, in Court of Errors, *Whiteside v. The People*, 26 Wend. (N. Y.) 634 (1841), reversing decision of Supreme Court in same case, 23 Wend. 9. See Act of Congress of July 25, 1866 (14 Statutes at Large, 243), regulating the

§ 285 (223). **Stated and Special Meetings; Power to adjourn; Notice.**—The usual division of the *meetings of corporate bodies* is into (1) *stated or regular*, and (2) *special* meetings; and meetings of either class possess an incidental power of *adjournment*, from whence we have another class known as *adjourned meetings*. The *time of holding regular or stated meetings* is fixed by the charter, or by ordinance or by-law passed in pursuance thereof; and, in either case, the time thus appointed is presumed to be known to the members of the body; and unless the charter or by-law otherwise provides, it is their duty to attend such meetings without further or special notice. Absent members, equally with those who are present, are bound by whatever is lawfully done at a regular or stated meeting, or any regular and valid adjourned meeting.<sup>1</sup>

§ 286 (224). **Notice of Special Meetings; how given.**—If the *meeting be a special one*, the general rule is, unless modified by the charter or statute, that *notice* is necessary, and must be personally served, if practicable, upon *every member* entitled to be present, so that each one may be afforded an opportunity to participate and vote.<sup>2</sup> By the charter of a city, the power of imposing taxes

election of United States senators by the legislatures of the several States in *joint assembly*, containing provisions (the necessity for which has been shown by experience) to prevent one of the bodies from defeating action.

<sup>1</sup> *People v. Batchelor*, 22 N. Y. 123 (1860); *Smith v. Law*, 21 N. Y. 296; *ante*, secs. 277, 278; *State v. Smith* (presumptions of regularity), 22 Minn. 218 (1875); *ante*, secs. 266, note, 269; *post*, secs. 286, note, 287, note, as to presumption of regularity; *Hudson Co. v. State* (presumptions of regularity), 4 Zab. (24 N. J. L.) 718; *Insurance Co. v. Sanders*, 36 N. H. 552. See and compare *State v. Jersey City*, 1 Dutch. (N. J.) 309. If the charter does not provide for the manner in which the time for holding "stated meetings" shall be fixed, the city council may fix or change the time by simple motion, though it has previously been fixed by a formal resolution, approved and published. *State v. Kantler*, 33 Minn. 69.

<sup>2</sup> *People v. Batchelor*, 22 N. Y. 123, 134, *per Selden, J.*; *Ib.* 146, *per Denio, J.*; *Rogers, In re*, 7 Cow. (N. Y.) 526, and

cases cited in valuable note; *Downing v. Rugar*, 21 Wend. (N. Y.) 178; *Burgess v. Pue*, 2 Gill (Md.), 254; *Stow v. Wyse*, 7 Conn. 214; *Harding v. Vandewater*, 40 Cal. 77; *Smyth v. Darley*, 2 House Lords Cases, 789 (1849). A charter provision that the council shall meet at such time and place as they may by resolution direct does not preclude other meetings than those fixed by such resolution, and such other meetings are valid if all the members actually attend and participate in the proceedings, and they are otherwise regular. *State v. Smith*, 22 Minn. 218. *Presumption* that all members were present and acted. *Ib. Ante*, secs. 266, note, 269, 285, note; *post*, 292, note.

At a stated meeting of a select body at which all the members are not present, it is not competent, in the opinion of the Court of Appeals of *New York*, in the absence of a statute or by-law to that effect, to appoint a *future new or special meeting to determine independent matters not taken up*, and which could not legally have been taken up at the stated meeting, and to act at such future time, unless *all* have *actual notice*. If any one thus en-

belonged to the inhabitants assembled in annual town meeting. It was provided that if at this meeting no tax was voted, or an insufficient tax, the common council "should call a meeting of the inhabitants, by advertisement or otherwise," for the purpose of having them vote a tax. The court seemed to be of opinion that the common council were obliged to specify the objects of the call in their notice, it being a special meeting; and it decided that if it did specify a particular purpose, that any act of the meeting "wholly beside the special purpose of the meeting as stated," was void.<sup>1</sup>

§ 287 (225). **Adjournment of Regular Meeting.**—A *regular meeting*, unless special provision is made to the contrary, *may adjourn* to a future fixed day; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation. Unless such be the special requirement of the charter or of a by-law, or the established or general usage, the adjourned regular meeting would not, it is supposed, be limited to completing particular items of business which had been actually entered upon and left unfinished at the first meeting; but might, if the adjournment was general, do any act which might lawfully have been done had no adjournment taken place.<sup>2</sup> Where the meeting, if a regular one, can only act upon a specific matter, or, if a special one, can only act upon matters of which notice has been given to the members, while it is competent in either case to adjourn, the adjourned meeting is in both cases limited, equally with the first meeting, to the specified matters.<sup>3</sup>

titled to notice does not receive it, and is not present, the action is void. *People v. Batchelor*, 22 N. Y. 128 (1860); to be read in connection with *Smith v. Law*, 21 N. Y. 296.

<sup>1</sup> *Bergen v. Clarkson*, 1 Halst. (N. J.) 352 (1796). See, also, *Rex v. Liverpool*, 2 Burr. 735; *Rex v. Doncaster*, *Id.* 738; *King v. Mayor, &c.*, 1 Str. 385; *Machell v. Nevinson*, 2 Ld. Raym. 1355; 2 Bac. Abr. 18.

<sup>2</sup> *Smith v. Law*, 21 N. Y. 296; *Warner v. Mower*, 11 Vt. 385; *People v. Batchelor*, 22 N. Y. 128; *Rawlinson on Corp.* (5th ed.) 136, note; *Rex v. Harris*, 1 B. & A. 936; *Scadding v. Lorant*, 5 Eng. Law and Equity, 16 (1851); *People v. Martin*, 1 Seld. (5 N. Y.) 22; *Street Case*, 1 La. An. 412; *Hudson Co. v. State*, 4 Zab. (24 N. J. L.) 718; *New Orleans v.*

*Brooks*, 36 La. An. 641; *Ex parte Mirande*, 73 Cal. 365. *Ante*, secs. 269, 285. Adjournment by minority to day appointed for regular meeting. *People v. Rochester*, 5 Lansing (N. Y.), 142 (1871).

<sup>3</sup> *Scadding v. Lorant*, 5 Eng. Law and Equity, 16; s. c. 17 Law T. 225, H. of L. (1851). In this case, the statute (a local act) required notice to be given of a meeting of vestrymen to be held for the purpose of making a rate for the relief of the poor. Such notice was given, specifying the purpose of the meeting; the meeting was held accordingly on the 12th of August, when it was resolved that a rate should be made; but as the details could not be completed, the meeting was adjourned, and at an adjourned meeting the matter of the rate was completed; but the

§ 288 (226). **Mode of Proceeding when convened.** — After a meeting of the council is duly convened, *the mode of proceeding is regulated* by the charter or constituent act, by ordinances passed for that purpose, and by the general rules, so far as in their nature applicable, which govern other deliberative and legislative bodies.<sup>1</sup> If the council consists of two boards, the concurrence of both is essential to valid legislation, and this concurrence must be by simultaneously existing bodies.<sup>2</sup> The rule of legislative bodies consisting of two branches, that unfinished business at the end of a session is discontinued, and must be afterwards taken up anew, if at all, was considered applicable to the legislative acts of the common council of New York, composed of a board of aldermen and a board of assistant aldermen.<sup>3</sup>

*notice for the adjourned meeting contained no mention of the purpose for which the meeting assembled.* And the question which the House of Lords put to the judges in reference to the adjourned meeting, was: "Supposing the rate to be otherwise valid, was it invalid by reason of the notice not stating the purpose for which the [adjourned] meeting assembled?" The judges answered: "We are unanimously of opinion that the rate was not rendered invalid by reason of the alleged defect in the notice of the adjourned meeting. It was sufficient to give notice [as required by the act] on the church door, of the purpose for which the first meeting was to be held, and, that notice having been duly given, we think that the notice so given extended to all the adjourned meetings, such adjourned meetings being held for the purpose of completing the unfinished business of the first meeting, and being in continuation of that meeting." And such was the judgment of the House of Lords. See, also, *Rex v. Harris*, 1 Barn. & Ad. 936. "Meetings may be adjourned, but nothing may be transacted at any adjourned meeting save the unfinished business of the former meeting." Brice's *Ultra Vires*, Green's Am. ed. 534, citing *Reg. v. Grimshaw*, 10 Q. B. 747, which holds that at an adjourned quarterly meeting notice must be given of any business not actually begun at the quarterly meeting, but of business actually begun no notice is necessary. The text, sec. 287, states the rule

as it seems to be understood in this country, viz. that under the conditions stated in the text the adjourned meeting may transact any business which might have been transacted by the regular meeting.

*Presumption as to regularity of adjournment* when proceedings of the adjourned meeting come before the court. *Hudson Co. v. State*, 4 Zab. (24 N. J. L.) 718; *Insurance Co. v. Sortwell*, 8 Allen (Mass.), 217; *State v. Jersey City*, 1 Dutch. (N. J.) 309; *State v. Smith*, 22 Minn. 218 (1875). *Supra*, sec. 285, note.

<sup>1</sup> Where an ordinance is enacted in accordance with the provisions of a statute, the fact that in its passage a parliamentary rule was violated, will not render it invalid. *McGraw v. Whitson*, 69 Iowa, 348. Where the mayor has the right to vote only in *case of a tie*, he may lawfully exercise the power when one half the members of the council have voted and the other half have abstained from voting. *Launtz v. People*, 118 Ill. 137. *Ante*, sec. 270.

<sup>2</sup> *Wetmore v. Story*, 22 Barb. (N. Y.) 414 (1856).

<sup>3</sup> *Wetmore v. Story*, 22 Barb. (N. Y.) 414 (1856). A subsequent council is bound by knowledge duly communicated to a previous council. *Bank v. Seton*, 1 Pet. (U. S.) 299 (1828). In *Commonwealth v. Lancaster*, 5 Watts (Pa.), 152, *Gibson, C. J.*, expressed his opinion to be that, notwithstanding a by-law or rule requires certain corporate acts to be in a

§ 289 (227). **Committees of Council.** — The council *may ascertain facts through the medium of a committee*, and the members of the council may, where they know the facts of their personal knowledge, act without further inquiry.<sup>1</sup> As a public corporation may entirely revoke the powers of a committee it has appointed, so it may control the execution of those powers by increasing the number of the committee. If the new members, either by design or mistake, are excluded from acting, the proceedings of the others will be irregular.<sup>2</sup>

§ 290 (228). **Right to rescind Previous Acts.** — At any time before the *rights of third persons* have vested, a council or other corporate body may, if consistent with its charter and rules of action, *rescind previous votes and orders*.<sup>3</sup> Thus a vote levying a

given form, and that alterations of such by-law or rule shall only be made by a vote of two thirds of the members, yet that a majority may repeal the by-law or rule, and may, without such repeal, do valid acts, not in the prescribed form, by a majority vote.

<sup>1</sup> *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, 296, *per Clifford, J.*; *Commonwealth v. Pittsburgh*, 14 Pa. St. 177; *Main v. Ft. Smith*, 49 Ark. 480. Council may order sewer to be built by a committee. *Collins v. Holyoke*, 146 Mass. 298 (1888); *Dorey v. Boston*, 146 Mass. 336, 339, and cases cited. As to power of council to appoint officers, and when it may delegate its powers to a committee. *Id.*; *Preble v. Portland*, 45 Me. 241; *Salmon v. Haynes*, 50 N. J. L. 97 (1888); *ante*, secs. 96, 200, 283, note. The English Municipal Corporations Act 1882; sec. 22, provides that "the council may appoint out of their own body such and so many committees as they think fit, for any purposes which in the opinion of the council would be better regulated and managed by means of such committees; but the acts of every such committee shall be submitted to the council for their approval."

<sup>2</sup> *Damon v. Granby*, 2 Pick. (Mass.) 345 (1824). In this case it was further held, where the agents of a town contracted with the plaintiff "to erect a meeting-house on a place to be designated by a committee of the town," that the town might disagree to the selection, and

"designate the place for themselves, at any time before the ground was prepared," on indemnifying the plaintiff for any extra labor or expense which their fluctuating proceedings may have occasioned. A notice to appear before a committee to whom a matter, as, for example, the laying out or altering of a street, has been duly referred, is equivalent to a notice to appear before the city council, as, for this purpose, the committee represent the council. *Preble v. Portland*, 45 Me. 241 (1858).

<sup>3</sup> *Bigelow v. Hillman*, 37 Me. 58; *Reiff v. Conner*, 5 Eng. (10 Ark.) 241; *State v. Hoyt*, 2 Oreg. 246; *ante*, sec. 69; *Road Case*, 17 Pa. St. 71, 75; *New Orleans v. St. Louis Church*, 11 La. An. 244. Reconsideration at subsequent meeting. *Locke v. Rochester*, 5 Lansing (N. Y.), 11 (1871); *Sank v. Philadelphia*, 1 Pa. Leg. Gaz. Rep. 259. "The right of *reconsidering* lost measures [at the same meeting, or pursuant to its rules] inheres in every body possessing legislative powers." *Per Whelpley, C. J.*, *Jersey City v. State*, 1 Vroom (30 N. J. L.), 521, 529 (1863); *Red v. Augusta*, 25 Ga. 386. "All deliberative assemblies, during their session, have a right to do and undo, consider and reconsider, as often as they think proper, and it is the *result* only which is done." *Per Kirkpatrick, C. J.*, in *State v. Foster*, 2 Halst. (N. J.) 101, 107 (1823). See, also, *State v. Jersey City*, 3 Dutch. (N. J.) 536. While public money is in the pos-

tax, so long as it rests in mere resolution, and has not been acted upon, may be reconsidered, and, if rescinded, the collector cannot legally proceed to collect the tax.<sup>1</sup>

§ 291 (229). **Charter requirement of Vote by Ayes and Nays.**—A provision of a city charter, that the *ayes and nays shall be called* and published whenever the vote of the common council shall be taken on any proposed improvement involving a tax or assessment upon the citizens, was considered, by two of the three of the members of the Supreme Court of New York, notwithstanding the use of the word "*shall*," to be directory merely, "the essential requisite being the determination of the corporation, and not the form or manner of expressing that determination."<sup>2</sup> But an *opposite view* has elsewhere, as we think properly, been taken of similar provisions, the courts regarding the requirement that votes shall in such cases be entered at large on the minutes, as intended to accomplish

session of the proper officer, the proper authorities have entire control over it, and they may, so far as the officer holding it is concerned, rescind a prior order (not yet complied with) to pay money to an individual. *Tucker v. Justices*, 13 Ire. (N. C.) Law, 434; *Dey v. Lee*, 4 Jones (N. C.) Law, 238. A resolution is not invalid because passed upon a reconsideration of a negative vote moved by one who voted originally with the minority. *Locke v. Rochester*, 5 Lansing (N. Y.), 11 (1871). But in *Sank v. Philadelphia*, 8 Phila. Rep. (by Wallace) 117, a *nisi prius* decision of the Supreme Court, it was held that the city councils, having once voted to sustain the mayor's veto of an ordinance passed by them, could not reconsider this vote, nor take any further action on the measure. 6 Am. Law Rev. 720.

The vote of a town meeting rescinding its former action in authorizing a subscription in aid of a railroad held to be lawful, no rights of third parties having vested, and nothing having been done under the authority to subscribe. *Estey v. Starr*, 56 Vt. 690. A vote ratifying a contract made by town officers without due authority cannot be rescinded so as to affect the validity of the contract. *Brown v. Winterport*, 79 Me. 305.

<sup>1</sup> *Stoddard v. Gilman*, 22 Vt. 568; *Pond v. Negus*, 3 Mass. 230.

<sup>2</sup> *Striker v. Kelly*, 7 Hill (N. Y.), 9,

24, 29 (1844), *Bronson, J.*, dissenting; s. c. in *Error*, 2 Denio, 323. Under a law requiring a vote of the common council, where more than a majority is required, to "be taken by the yeas and nays, which shall be entered on the journal," the proceeding, to be valid, must appear from the journal itself, and cannot be proved by evidence *aliunde*. *Carlton Street, In re*, 16 Hun (N. Y.), 497. See *McCormick v. Bay City*, 23 Mich. 457 (1871); *Indianola v. Jones*, 29 Iowa, 282; *Mount Morris Square, In re*, 2 Hill, 20; *Elmendorf v. Mayor, &c. of N. Y.*, 25 Wend. 693. See also, *Solomon City v. Hughes*, 24 Kan. 211. The view expressed in the *New York* cases, referred to and approved. *St. Louis v. Foster*, 52 Mo. 513 (1873); *per Wagner, J.*; *post*, sec. 450, note. In *Morrison v. Lawrence*, 98 Mass. 219, the grant of an important special power was construed to require, as a condition to its exercise, the taking of the ayes and nays, and a record of the vote. The decision or determination of a question by a town meeting or common council should be, and probably must be, by a formal vote or resolution. *People v. Adams*, 9 Wend. (N. Y.) 333 (1832); *Denning v. Roome*, 6 Wend. (N. Y.) 651 (1831). A requirement that the vote "shall in all cases be taken by ayes and noes" held not to apply to votes on *motions to adjourn*. *Green Bay v. Brauns*, 50 Wis. 204.

an important public purpose, and therefore consider the provision as mandatory, and its observance essential to valid corporate action.<sup>1</sup> The proper remedy for the council is to cause a *nunc pro tunc* entry to be made.<sup>2</sup> This it has power to do.<sup>3</sup> Statutory provision requiring for the *passage of municipal ordinances* of a general nature that they *be read on three different days*, unless three-fourths of all the members elected shall dispense with the rule, is mandatory. Thus where two ordinances were reported for passage, and the requisite number voted in favor of suspending the rule for reading on different days, and the ordinances were respectively passed, it was held that the vote suspending the rules applied only to the first ordinance, and that the second was not legally adopted.<sup>4</sup>

§ 292 (230). **Acts by less than Quorum void.**—Acts done *when less than a legal quorum* is present, or which were not concurred in by the requisite number, are void.<sup>5</sup> This is a fundamental rule in

<sup>1</sup> Steckert v. East Saginaw, 22 Mich. 104 (1870), where the purpose of the requirement is well expounded; Spangler v. Jacoby, 14 Ill. 297; Supervisors, &c. v. People, 25 Ill. 181; Morrison v. Lawrence, *supra*; McCormick v. Bay City, 23 Mich. 457 (1871); Delphi v. Evans, 36 Ind. 90 (1871); Cutler v. Russellville, 40 Ark. 105; Town of Olin v. Meyers, 55 Iowa, 209. Accordingly a provision of statute that no ordinance for the improvement of a street should be adopted, except upon the report and recommendation of the city board of improvements, and requiring that such report be recorded in its proceedings, is mandatory, and the report and recommendation were held jurisdictional, and not provable by parol evidence. Reynolds v. Schweinefus, 1 Sup. Court, Cin. (Ohio) Rep. 215.

Where a general law required the yeas and nays to be called and recorded on the passage of all ordinances, it was held by the Supreme Court of Colorado that when the record failed to show such calling and recording as to an ordinance concerning misdemeanors, the ordinance was a nullity and a conviction under it void. Tracy v. The People, 6 Col. 151.

Where a local improvement is proposed, and it is not petitioned for by a majority of the owners of property to be assessed, the charter declares that it shall be ordered *only* by the vote of at least three-fourths

of all the aldermen present, such vote to be by *ayes* and *nays* on the record of the common council; if, when the record is presented, it does not appear that the improvement was ordered by a vote of three-fourths of the aldermen present, by vote entered by ayes and nays, the ordinance is void, and judgment for a sale of the property to pay the local assessment cannot rightfully be entered. Rich v. Chicago, 59 Ill. 286 (1871). Effect of such a provision on the power to make a contract by parol. Indianola v. Jones, 29 Iowa, 282 (1870); *post*, sec. 449, and note.

<sup>2</sup> Logansport v. Crockett, 64 Ind. 319; Mayhew v. Gay Head, 13 Allen, 129; Steckert v. East Saginaw, 22 Mich. 104; Delphi v. Evans, 36 Ind. 90; Commissioners v. Hearne, 59 Ala. 371; Musselman v. Manly, 42 Ind. 462; Vawter v. Franklin College, 53 Ind. 88.

<sup>3</sup> See preceding note.

<sup>4</sup> Bloom v. City of Xenia, 32 Ohio St. 461; s. p. Morrison v. Lawrence, 98 Mass. 219; State v. Hudson, 5 Dutch. (N. J.) 478; Delphi v. Evans, 36 Ind. 90. This is not the rule in *New York*. Cases *supra*.

<sup>5</sup> Logansport v. Legg, 20 Ind. 315 (1863); Ferguson v. Chittenden Co., 1 Eng. (6 Ark.) 479 (1846); Price v. Railroad Company, 13 Ind. 58 (1859); McCracken v. San Francisco, 16 Cal. 591; Pimental



the law of corporations; but whether, in favor of the holder of negotiable securities issued, or purporting to be issued, under authority conferred by the legislature, the corporation might not, in some cases, be estopped to show that a quorum was not present or that the requisite number did not concur in the act, is a question which remains, perhaps, to be settled.<sup>1</sup> It is clear that members of a council cannot properly act upon questions in which *their own pecuniary interest* is directly and specially involved.<sup>2</sup> But it has been held in Michigan that proceedings on the part of a municipal corporation ordering a paving improvement are not rendered invalid on the ground that two of the aldermen who formed part of the quorum of the common council which ordered the improvement, and without whose presence there would have been no quorum, were petitioners for the improvement and owners of property liable to assessment therefor. It might be otherwise, the court concede, if the common council acted as commissioners of apportionment in making the assessment upon the property that was to bear the burden, or on the confirmation of a report in which the interest of these aldermen was directly involved.<sup>3</sup>

*v. San Francisco*, 21 Cal. 351; *State v. Wilkesville*, 20 Ohio St. 288. Number present and acting, how proved. 13 Ind. 58, *supra*. Presence of quorum, when presumed. *Insurance Company v. Sortwell*, 8 Allen (Mass.), 217. *Ante*, secs. 286, note, 287, note, 285, note, 286, note.

<sup>1</sup> See *ante*, sec. 89; *post*, chapter on Contracts. Construction of charter provision requiring *unanimity*. *Post*, sec. 310.

<sup>2</sup> Members of a municipal board are disqualified to vote therein on propositions in which they have a direct pecuniary interest adverse to the municipality they represent. *Oconto County Sup. v. Hall*, 47 Wis. 208; *Pickett v. School Dist.*, 25 Wis. 551; *Coles v. Williamsburgh*, 10 Wend. 659; *Walworth Bank v. F. L. & T. Co.*, 16 Wis. 629; *United Brethren Church v. Vandusen*, 37 Wis. 54. *Post*, chap. xiv.; *ante*, sec. 237, note. There is an

express provision to this effect in the English Municipal Corporations Act of 1882, sec. 22.

<sup>3</sup> *Steckert v. East Saginaw*, 22 Mich. 104 (1870), where the reasons for the distinctions taken are clearly stated by *Cooley, J.* In the same State it was also held that the mayor of a city, who was a practising lawyer, might lawfully be employed, when there was no collusion or fraud, and no doubt as to the necessity and value of his services, by a resolution of the council to appear and defend a suit against the city, and that he could recover the value of his services. *Niles, Mayor, &c. v. Muzzy*, 33 Mich. 61 (1875); s. c. 20 Am. Rep. 670.

*Right of corporation to contract with its officers or councilmen.* *Ante*, sec. 283, note, and cases cited; *post*, sec. 443, note.

NOTE. — In *Rushville Gas Co. v. Rushville* (Ind. Sup. Ct. 1889, MSS., 41 Alb. L. J. 143), the city council was composed of six members, all of whom were present and qualified to vote upon a resolution, which, when submitted, was voted for by three members, the other three, though present, refusing to vote. The court held that the resolution, having received the vote of a majority of a quorum, although not of a majority of all present, was legally adopted. It deserves further consideration whether this result is consistent with the majority rule applicable to definite bodies.

## CHAPTER XI.

## CORPORATE RECORDS AND DOCUMENTS. — CUSTODY. — RIGHT OF INSPECTION.

\*

§ 293 (231). **Power to appoint Clerk pro tem.**—Corporations have the *incidental power*, if the regular clerk is temporarily absent, to appoint a private person a *clerk pro tem.*, for the purpose of making the entries of what is transacted at the corporate meeting. His entries, made by the direction of the corporate authorities, or entries made by the regular clerk from memoranda furnished by the clerk *pro tem.*, are competent evidence of the proceedings of the meeting.<sup>1</sup>

§ 294 (232). **Amendment of Record.**—The clerk or officer of a New England town,<sup>2</sup> who has made an erroneous record, may, while in office (but not afterwards), or after a re-election to the same office, amend the same according to the truth, being liable, like a sheriff who amends his return, for any abuse of the right; as, where he makes a fraudulent or untruthful amendment, the town is not concluded or

<sup>1</sup> Hutchinson v. Pratt, 11 Vt. 402 (1839). See also Rex v. Mothersell, 1 Stra. 93, also referred to *infra*. Board of public works of a city is a *quasi* corporation, and the nature of its duties, laying out streets, establishing grades, sewers, &c., requires it to keep a record of its proceedings, although no such record is in terms provided for. Larned v. Briscoe, 62 Mich. 393 (1886). Sufficiency of memoranda. Louisville v. McKegney, 7 Bush (Ky.), 651 (1870). Failure of clerk to take oath of office does not invalidate his record. Stebbins v. Merrit, 10 Cush. (Mass.) 27; ante, sec. 214. Signature of chairman to minutes affixed at a day subsequent to the meeting held sufficient, under a statute requiring the minutes of corporate meetings to be signed by the chairman. Miles v. Bough, 3 Gale & D. 119; Inglis v. Railway Co., 16 Eng. Law & Eq. 55. See also ante, chapters relating to Corporate Meetings and Corporate Officers; post, sec.

331; Logansport v. Crockett, 64 Ind. 319 (1878), citing text.

<sup>2</sup> Ante, secs. 29, 30, as to New England towns. New Haven, &c., Railroad Co. v. Chatham, 42 Conn. 465. Speaking of the records of the town of Concord, Massachusetts, Ralph Waldo Emerson in his Concord Address says: "I have read with care the town records themselves. They exhibit a pleasing picture of a community almost exclusively agricultural, where no man has much time for words, in his search after things; of a community of great simplicity of manners, and of a manifest love of justice. I find our annals marked with a uniform good sense. The tone of the record rises with the dignity of the event. These soiled and musty books are luminous and electric within. The old town clerks did not spell very correctly, but they contrive to make intelligible the will of a free and just community."

*bound by an erroneous record, whether made by design or accident, unless when it would on general principles be estopped.*<sup>1</sup>

<sup>1</sup> *Cass v. Bellows*, 11 *Fost.* (31 N. H.) 501 (1855); *Harris v. School District*, 8 *Fost.* (28 N. H.) 53, 66 (1853); *Gibson v. Bailey*, 9 N. H. 168; *Whittier v. Varney*, 10 N. H. 291; *Welles v. Battelle*, 11 *Mass.* 477; *Low v. Pettengill*, 12 N. H. 340; *Pierce v. Richardson*, 37 N. H. 306; *Scammon v. Scammon*, 8 *Fost.* (28 N. H.) 429; *President, &c. v. O'Malley*, 18 *Ill.* 407 (1857); *Mott v. Reynolds*, 27 *Vt.* (1 *Wms.*) 206 (1855); *Boston Turnpike Co. v. Pomfret*, 20 *Conn.* 590 (1850); compare *Covington v. Ludlow*, 1 *Met.* (Ky.) 295, below cited.

The necessity and reasonableness of the doctrine stated in the text are thus expounded by *Parker, C. J.*, in *Welles v. Battelle*, 11 *Mass.* 477, 481 (1814): "We have had frequent occasion to perceive the great irregularity which prevails in the records of our towns and other municipal corporations; and the courts have always been desirous to uphold these proceedings, where no fraud or wilful error was discoverable. Too much strictness on subjects of this nature would throw the whole body politic into confusion (*Kellar v. Savage*, 17 *Me.* 444). For it cannot be expected that, in all corporations, persons will be every year selected who are capable of performing their duty with the exactness which would be useful or convenient. . . . The first entry made by the clerk here [that an officer was sworn into office] was certainly defective, but the defect is properly cured by the subsequent entry of the existing clerk, he being the same person that officiated at the time of the first entry. He will be sufficiently watched by interested parties, to render a deviation from truth neither safe nor easy." The doctrine of the case in 11 *Mass.* 477 was followed and applied in *Chamberlain v. Dover*, 13 *Me.* 466 (1836), where it was further held that the municipal body was not bound by an erroneous record of a clerk, even though the plaintiffs, confiding in its correctness, had made a building contract with the "contracting and building committee" named in the record. The meeting in this case, which attempted to confer this power

upon the committee, was not a legal one, because not held at the time and place appointed; and it was considered by the court that the plaintiff's remedy was against the committee, and not against the town, if the former acted without authority. See further as to correcting and amending records, *Williams v. School District*, 21 *Pick.* 75, holding that where two different, but not contradictory records were made up by the clerk from memoranda taken at the meeting, both were originals and competent testimony.

*Clerk cannot amend records after he is out of office.* *School District v. Atherton*, 12 *Met.* (Mass.) 105 (1846); *Hartwell v. Littleton*, 13 *Pick.* (Mass.) 229, 232 (1832). *Contra*, to the effect that he may amend, though out of office at the time, see *Gibson v. Bailey*, 9 N. H. 168 (1838); *Gibson v. Bailey* followed in *Missouri* in one case, *Kiley v. Cranor*, 51 *Mo.* 541, 543 (1873). But may, while he is in office. *Bishop v. Cone*, 3 N. H. 513 (1821); *Hoag v. Dufrey*, 1 *Aiken* (Vt.), 286 (1826); *Chamberlain v. Dover*, 13 *Me.* 466 (1836). That successor cannot make the amendment. *State v. Williams*, 25 *Me.* 555, 561; 29 *Me.* 523; *Taylor v. Henry*, 2 *Pick.* (Mass.) 397. But the corporation might, in proper cases, authorize the successor to supply the omitted, or correct the erroneous, entry. *Hutchinson v. Pratt*, 11 *Vt.* 402, 419. Bonds of a city which by statute are directed to be signed by the mayor, but which were in fact signed by the ex-mayor, were held to be void even in the hands of a *bona fide* holder for value. *Coler v. Cleburne*, 131 *U. S.* 162 (1889).

In *New Hampshire* it is the practice to allow these amendments only upon the order of the Supreme Court or Court of Common Pleas by the officer by whom they were made, even after he has ceased to hold the office. A clear case must be made out. The court do not permit any erasures or interlineations of the original record, but require the amendment to be written upon a separate piece of paper, signed by the proper officers, and with it a copy of the order allowing the amend-

§ 295 (233). **Same subject.** — In a case in Vermont, the clerk of the town, *pending the trial, amended the record* by adding his signature as clerk to the record of the warning for the meeting in question. His right to do so, though he had meantime been out of office, but was again restored, was sanctioned by the Supreme Court, Redfield, C. J., remarking: "We think, in general, it must be regarded as the right of the clerk of a town or other municipal corporation, while having the custody of the records, to make any record according to the facts. ♦ His having been out of office, and restored again, could not deprive him of that right. But even an officer could not alter or amend a record upon the testimony of third persons ordinarily, and ought not to do it upon his own recollection, unless in very obvious cases of omission or error, of which the present might fairly be regarded as one, probably. Such amendments should ordinarily be made by the original documents or minutes."<sup>1</sup>

§ 296. **Right of Clerk to amend Records ex parte.** — The right of the clerk *ex parte* to amend the records of the proceedings of town corporations was very thoroughly considered in a case in Connecticut.<sup>2</sup> The statute of that State requires town-clerks to keep the record books of their respective towns, and to enter truly all the votes and proceedings of the town. The town-clerk made an entry showing that at a town-meeting held in 1843, the town assumed to the plaintiff a liability to commence January 1, 1844. If the time thus stated was the true time, the plaintiff had a cause of action against the town. In 1849 the clerk, not upon his own personal knowledge, or upon any written memorandum, but on the information of others (with the correctness of which, however, he was perfectly satisfied), amended the record so as to show that the liability of the town was not, by the vote, to commence until April 1, 1844. If this was the true time, the plaintiff had no cause of action. The majority of the court (three judges against two) held that the clerk,

ment; and this paper is annexed to the original record. *Pierce v. Richardson*, 37 N. H. 306, 311, *per Bell*, J.

<sup>1</sup> *Mott v. Reynolds*, 27 Vt. (1 Wms.) 206, 208 (1855). Amendments in open court of town record by clerk of the town, pending trial to which the clerk is a party, and to meet a particular decision of the court, disregarded. *Hadley v. Chamberlin*, 11 Vt. 618 (1839). Commented on and distinguished. *Mott v. Reynolds*, 27 Vt. (1 Wms.) 206 (1855).

<sup>2</sup> *Boston Turnpike Co. v. Pomfret*, 20 Conn. 590 (1850). The subject of amendments of the records of the proceedings of a common council in *Connecticut*, when it can be made by the clerk and when by order of court upon *mandamus*, is considered in *Samis v. King*, 40 Conn. 298 (1873). Parties to *mandamus* to compel the clerk of a city to amend record. *Farrell v. King*, 41 Conn. 448 (1874); *Logansport v. Crockett*, 64 Ind. 319 (1878).

still continuing in office, was competent to amend the record; that *this power is derived solely from his official character* and does not depend on the permission of the court in which the record is offered as an instrument of evidence, nor on inquiry into the truth of it as originally made, or as amended, and that such a record is, in such an action, conclusive evidence of its own truth. The dissenting judges, without denying the power of amendment in all cases, were of opinion that, in view of the lapse of time and the absence of written memoranda or personal recollection by the clerk, the clerk had no authority to make the amendment, and that the correct course would have been to make application to the proper court by legal process, *e. g.*, *mandamus*, to correct the mistake in the record, if one existed, and thus give the opposite interested party an opportunity to show that the record was already right. It would seem, under the special circumstances, that the dissenting view was the better one.

§ 297 (234). **When Record amended, and by whom.** — Where the clerk makes up the record of the proceedings of the council, and it is read and approved at the same or at a subsequent meeting, the author doubts the authority of the clerk, *on his own motion*, to amend it afterwards without the direction of the council. The council, unless private rights have attached, may, doubtless, order the record of its own proceedings, even after it has once been approved, to be corrected according to the facts. The Court of Appeals of Kentucky, without determining the extent of the power of the same council at a subsequent meeting to correct errors and omissions in the journal entry of proceedings at a previous meeting, decided that this could not be done *by an entirely new board* in respect to the official action of their predecessors; and it was accordingly held that where the records, as kept, showed only that in August, 1854, an ordinance was reported, a new council could not, in 1856, add to the records words showing that the ordinance had passed, nor could the fact of its passage be shown by extrinsic evidence.<sup>1</sup>

<sup>1</sup> Covington v. Ludlow, 1 Met. (Ky.) 295 (1858); see, also, Lexington v. Headley, 5 Bush (Ky.), 508 (1869); Graham v. Carondelet, 33 Mo. 262; State v. Jersey City, 1 Vroom (30 N. J. L.), 93, 148, and *ante*, chapters on Corporate Meetings and Ordinances; *post*, sec. 310; *ante*, sec. 290. A public corporation may, like every court of record, amend its records *nunc pro tunc*. Commissioners v. Hearne, 59 Ala.

371; Musselman v. Manly, 42 Ind. 462; Vawter v. Franklin College, 53 Ind. 88; Logansport v. Crockett, 64 Ind. 319; Mayhew v. Gay Head, 13 Allen, 129; Steckert v. East Saginaw, 22 Mich. 104; Pontiac v. Axford, 49 Mich. 69; Delphi v. Evans, 36 Ind. 90; Chamberlain v. Evansville (*nunc pro tunc* entry supplying clerical omission), 77 Ind. 542 (1881), citing text. —

§ 298 (235). **When Parol Evidence admissible, and when not.** — *Parol evidence* may, if necessary, be admitted to *apply a resolution or recorded vote of a town to its proper subject-matter*,<sup>1</sup> but not, in general, to *explain, enlarge, or contradict its terms or meaning*, in respect to matters (as, for example, laying out a highway or street) regularly within the jurisdiction of the town or its officers, and where the entry of record is made in pursuance of statute requirement.<sup>2</sup> Where the record of a meeting states that "the inhabitants met and adjourned the meeting," *parol evidence may be admitted to show when and where the meeting was held, how many were present, and how many afterwards came, and, finding no meeting, went home.*<sup>3</sup>

§ 299 (236). **Same subject.** — *Parol evidence in a collateral action* cannot be received to *contradict the records* of a public corporation, required by statute to be kept in writing, or to show a *mistake* in the matters as therein recorded. Thus, if the records of a school

<sup>1</sup> *Baker v. Windham*, 13 Me. (1 Shep.) 74 (1836). In this case the town of Windham entered upon its records the following: "Voted to indemnify *Benj. Baker* in his costs in the action against *A. Small*, which have or may arise in the same on account of *Gray* line." In an action by Baker against the town to recover costs of a suit which he had brought against Small, parol evidence was adjudged to have been rightly admitted to show that Baker brought the action in his name against Small, on account of the *Gray* line, at the request of the selectmen of Windham, for the purpose of settling a disputed line between that and the adjoining town, with the express agreement that the town should pay all costs, and to show that these facts were before the town when the vote was passed, and also to show that the suit so instituted was conducted under the advice and direction of the authorities of the town.

<sup>2</sup> *Manning v. Fifth Parish, &c.*, 6 Pick. (Mass.) 16; *Wild v. Deig*, 43 Ind. 455 (1873); *Crommett v. Pearson*, 18 Me. 344; see *Leavitt v. Eastman*, 77 Me. 117; *Covington v. Ludlow*, 1 Met. (Ky.) 295; *Cabot v. Britt*, 36 Vt. 349; *Lexington v. Headley*, 5 Bush (Ky.), 508 (1869); *Galbraith v. Littiech*, 73 Ill. 209; *Pittsburgh v. Cluley*, 74 Pa. St. 262; *post*, sec. 310; *ante*, sec. 291. Parol evidence is not admissible where no sufficient reason is shown

for not producing the record of proceedings, which is the primary evidence. *Aurora v. Fox*, 78 Ind. 1 (1881).

<sup>3</sup> *Chamberlain v. Dover*, 13 Me. 466 (1836). But parol evidence of an adjournment to another day cannot be given so as to validate acts done on the day adjourned to. *Taylor v. Henry*, 2 Pick. (Mass.) 397. Where a statute requiring a record to be made of the persons sworn into office is directory, if the record is not made, the fact may be shown by parol or other competent evidence. *Kellar v. Savage*, 17 Me. (5 Shep.) 444 (1840). In *Meth. Chapel Corp. v. Herrick*, 25 Me. 354, it was *held*, that to establish a resulting trust in the corporation [with respect to lands], it could not prove by parol evidence the authority of the committees to act for it; the authority should appear, and could only be shown by its records. Further, as to what facts may be shown by parol, *West Bath v. Co. Comm'rs*, 36 Me. 74; 35 Me. 373; *Smith v. County Comm'rs*, 42 Me. 395; *Leavitt v. Eastman*, 77 Me. 117; *Long v. Battle Creek*, 39 Mich. 323; *Kohlhepp v. West Roxbury*, 120 Mass. 596; *Oliphant v. Comm'rs*, 18 Kan. 386 (1877); *Austin v. Allen*, 6 Wis. 134; *Anderson v. Comm'rs*, 12 Ohio St. 635 (1861); *Gurnsey v. Edwards*, 26 N. H. 224; *Lewis, Em. Dom.* sec. 605, and cases; *ante*, sec. 268, and note; *post*, sec. 310.

district show that the district voted to authorize their clerk to call and warn "their *annual* meetings," parol evidence in an action by the district is not admissible to prove that the real vote of the district was to authorize the clerk to call and warn *all* district meetings.<sup>1</sup> So, where the record of a town stated the warning to have been on the 17th, and the meeting to have been held on the 19th of January, parol evidence cannot be admitted to show that, by mistake, the clerk inserted the "19th" instead of the "29th." The remedy is, to have him correct the record, if in office, according to the truth.<sup>2</sup>

§ 300 (237). **Proof of omitted Facts by Parol.** — But a *distinction* has sometimes been drawn between evidence *to contradict facts* stated on the record and evidence *to show facts omitted* to be stated upon the record. Parol evidence of the latter kind is receivable unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence.<sup>3</sup> Thus,

<sup>1</sup> *School District v. Atherton*, 12 Met. (Mass.) 105 (1846); *Morrison v. Lawrence*, 98 Mass. 219; *Mayhew v. Gay Head*, 13 Allen (Mass.), 129. The cases are not uniform on the subject of the collateral impeachment of the record of public boards and bodies. See Lewis, Em. Dom. chap. xxvi. and cases.

<sup>2</sup> *Durfey v. Hoag*, 1 Aiken (Vt.), 286 (1826). Where the record recited that the rules were suspended, without showing by what vote, it was conclusively presumed in a collateral proceeding to be correct, and oral evidence to prove otherwise was rejected. *Eldora v. Burlingame*, 62 Iowa, 32. So in *Connecticut*, if a town corporation makes an erroneous record of its proceedings, this cannot be contradicted in a collateral action. In such an action the record is conclusive. If false, and the corporation will not correct the record, a party interested may, by *mandamus*, compel it to make the correction. *Boston Turnpike Co. v. Pomfret*, 20 Conn. 590 (1850). Upon this point, all the judges, though differing on other points, seemed to agree. So, on an appeal from an assessment for a city street, — *Held*, that *parol evidence was not admissible* to prove that the common council agreed to an arrangement proposed by the appellant and recommended by the committee on streets, that in consideration of his opening and grad-

ing certain streets without expense to the city, he should not be called on to pay any assessment when the street in question should at some future time be laid out. It seems that such an agreement, however proved, would be of no validity. *Gilbert v. New Haven*, 40 Conn. 102 (1873); see *Nichols v. Bridgeport*, 23 Conn. 189; *post*, chap. xix.; *supra*, sec. 295.

Purchasers of such paper [bonds issued by cities for stock in railroads] look at the form of the paper, the law which authorized it to be issued, and the *recorded* proceedings on which it is based. Therefore, as against purchasers, the record cannot be contradicted by parol evidence. *Per Clifford, J.*, in *Bissell v. Jeffersonville* (action on municipal bonds), 24 How. (U. S.) 287, 298. See chapter xiv. on Contracts, *post*, as to the rights of holders of such securities.

<sup>3</sup> *Moor v. Newfield*, 4 Greenl. (Me.) 44 (1826). "The only legal mode of proving facts on record is by the record itself, or by an attested copy of it." *Ib.*, *per Mellen, C. J.*; *School District v. Atherton*, 12 Met. (Mass.) 105, 113 (1847), *per Dewey, J.*; *Langsdale v. Bonton*, 12 Ind. 467; *Indianapolis v. Imberry*, 17 Ind. 175, 179; *Delphi v. Evans* (referring to previous cases), 36 Ind. 90 (1871); *Bigelow v. Perth Amboy*, 1 Dutch. (N. J.) 297

in a well-considered case in the Supreme Court of the United States,<sup>1</sup> it was held that the acts of a corporation might be proved otherwise

(1855); *Gearhart v. Dixon*, 1 Pa. St. 224 (1845); *Bridgford v. Tuscomb*, 4 Woods, 611; s. c. 16 Fed. R. 910. Where the law or charter *requires* the clerk to keep a *journal* of all of the acts and proceedings of the city council, that, or a copy, is the proper evidence of the official doings of the body. *Lowell v. Wheelock*, 11 Cush. (Mass.) 391 (1853); *Harris v. Whitcomb*, 4 Gray (Mass.), 433; *Morrison v. Lawrence*, 98 Mass. 219; *Louisville v. McKegney*, 7 Bush (Ky.), 651 (1870); *post*, sec. 310.

The Supreme Court of *Kansas*, advert-  
ing to the distinction in the text, sus-  
tained under the circumstances stated  
below the introduction of *parol testimony*  
*as a means of establishing in part the pas-*  
*sage of an ordinance.* *Troy v. Atchison*,  
&c. Railroad Co., 13 Kan. 70 (1874);  
s. c. 11 Kan. 519. The exact point de-  
cided appears from the syllabus settled  
by the judges, which is as follows: Where  
a city fails to provide any book for the  
record of its ordinances, but its ordin-  
ances, after their passage and approval, are  
placed and kept on file in the office of the  
city clerk, and a third party obtains a duly  
certified copy of an ordinance so placed  
and kept on file, and acts in good faith  
upon such ordinance, and is induced  
partly thereby to make large expendi-  
ture of money, in a subsequent contro-  
versy between the city and such third  
parties or their assigns the rule of equita-  
ble estoppel will apply to the city, and  
the due passage and existence of said  
ordinance may be shown by parol testi-  
mony. *Troy v. Atchison, &c. Railroad*  
*Co. et al.*, 13 Kan. 70 (1874); *post*, secs.  
310, 422. In a case where the authority  
for grading a street was in question, parol  
testimony was held properly admitted to  
show that a clause in an ordinance grant-  
ing the authority had been struck out be-  
fore its passage, and had been reinstated  
by a clerk, by whose direction it was  
printed, and a printed copy thus altered  
placed by him in the record book. *Dyer*  
*v. Brogan*, 70 Cal. 136. *Proof of estab-*  
*lishment and change of grade of streets*, see  
*post*, chap. xxiii.

<sup>1</sup> *Bank, &c. v. Dandridge*, 12 Wheat.  
64. Delivering the opinion of the court,  
Mr. Justice *Story*, *arguendo*, makes these  
important observations: "Would the  
*omission of the corporation to record its*  
*own doings* have prejudiced the rights of  
the party relying upon the good faith of  
an actual vote of the corporation? If such  
omission would not be fatal to the plaintiff  
in suits against the corporation (as, in our  
opinion, it would not be), it establishes the  
fact that acts of the corporation, not re-  
corded, may be established by parol proofs,  
and, of course, by presumptive proofs.  
In reason and justice, there does not seem  
any solid ground why a corporation may  
not, in case of the omission of its officers  
to preserve a written record, give such  
proofs to support its rights as would be  
admissible in suits against it to support  
adverse rights. The true question in such  
case would seem to be, not which party  
was plaintiff or defendant, but whether  
the evidence was the best the nature of  
the case admitted of, and left nothing be-  
hind in the possession or control of the  
party higher than secondary evidence.  
. . . We do not admit, as a general propo-  
sition, that the acts of a corporation are  
invalid merely from an omission to have  
them reduced to writing, unless the statu-  
te creating it makes such writing indis-  
pensable as evidence, or gives to them an  
obligatory force. If the statute imposes  
such restriction, it must be obeyed." (12  
Wheat. 69, 74.) This was the case of a  
private corporation. The same principle  
was applied, in the case of the United  
States *v. Fillebrown*, 7 Pet. 28, *to the acts*  
*of boards of public agents or officers*, and  
it was in that case accordingly held that  
the board of commissioners of the navy  
hospital fund, not being required by law  
to reduce its proceedings to writing in or-  
der to make them binding, oral evidence  
of such proceedings (no record having  
been made) was competent. See *Langs-*  
*dale v. Bonton*, 12 Ind. 467. In a case in  
*Vermont* in respect of a town which is re-  
quired to keep a record, it is said that it  
"appears to us that *in the absence of all*  
*record*, it might be competent for the de-



than by its records or some written document, even although it was its duty "to keep a fair and regular record of its proceedings." The statute did not prescribe that nothing but a recorded vote or written document should bind the corporation or be received as evidence. Such written evidence was not deemed indispensable unless positively required. The direction to keep a record was regarded as directory.

§ 301 (238). *Same subject.* — Where the *records of a municipal corporation have been so carelessly and imperfectly kept* as not to show the adoption of a resolution or other acts of the city council, and there is no written evidence in existence, *parol testimony* may be admitted, *e. g.*, to show that certain work was done by authority of the city, by proving the passage of a resolution of the council, the appointment of a committee to make the expenditure, their report after the work was done, and its adoption by the council.<sup>1</sup>

pendants (trustees and collector of the corporation justifying under its proceedings) to show, by parol, the proceedings of the meeting. Where there is a record, it cannot be added to or varied by parol. *Taylor v. Henry*, 2 Pick. (Mass.) 403. But where there is an omission to make records, the rights of other persons, acting under or upon the faith of a vote not recorded, ought not to be prejudiced. And it would seem that the right in such a case is reciprocal in the corporation and in those who claim adversely to it." *Per Williams, C. J., Hutchinson v. Pratt*, 11 Vt. 402, 421. But compare *Stevens v. Eden, &c. Society*, 12 Vt. 688 ; 16 Vt. 439 ; 17 Vt. 337.

The rights of *creditors or of third persons* cannot be prejudiced by the *neglect* of the council to keep proper minutes ; against the corporation, what the council in fact did may be shown by evidence *aliunde* the record kept by it. *Bigelow v. Perth Amboy*, 1 Dutch. (N. J.) 297 (1855) ; *San Antonio v. Lewis*, 9 Tex. 69 (1852).

Proof of the action and orders of a municipal *board of health*, see chapter on Ordinances, *post*, sec. 371, note.

<sup>1</sup> *Ross v. Madison*, 1 Ind. (Carter) 281 (1848) ; *Lingsdale v. Bonton*, 12 Ind. 467 ; *Indianapolis v. Imberry*, 17 Ind. 175, 179 ; *Delphi v. Evans* (reviewing previous cases), 36 Ind. 90 (1871). In the same

State, however, county commissioners and township trustees are required by law to keep a true record of their proceedings, and it was held under the circumstances appearing in the cases below cited, that they "can only speak by their record" when legally assembled. *County Comm'rs v. Chitwood*, 8 Ind. 504, 507 (1851) ; *Trustees v. Osborne*, 9 Ind. 458. So, in *Maine*, "school districts are required by law to keep an account of their proceedings by a sworn clerk, and such proceedings can be proved only by the record or a copy thereof duly authenticated." *Jordan v. School District*, 38 Me. 164 (1854). The records of public or *quasi* corporations are not, in *Ohio*, considered to be "of that absolute verity that any person shall be estopped to show the truth, in consequence of any matter which they contain" or omit to contain ; and it was accordingly adjudged that the fact whether an official bond was received or refused and rejected may be shown by *parol* evidence, on which point the record was silent. *Westerhaven v. Clive*, 5 Ohio, 136 (1821), as to records of township trustees. See *Green v. State*, 8 Ohio, 310 (1838), in which it was queried whether the county commissioners could appoint an agent by *parol* or only by record. In *Iowa*, it has been held that where no record entry is made, such an appointment may be shown by parol testimony, and that the agent acted accord-

§ 302 (239). **Mandamus to enforce Delivery of Corporate Books and Records; Replevin.** — *Mandamus* is an appropriate remedy for the duly elected and authorized officer of a public or municipal corporation to compel the *delivery to him* by his predecessor, or by an usurper, *of the books, papers, records, and seal* pertaining to the office.<sup>1</sup> And such a corporation, it has been held (though the cases are conflicting), *may maintain replevin* in its name for the possession of its record; and this action is maintainable against a stranger or any officer or person not legally entitled to the custody of the records.<sup>2</sup>

ingly. *Powesheik County v. Ross*, 9 Iowa, 511; *Athearn v. District*, 33 Iowa, 105 (1871); and see acc. *Ross v. Madison*, 1 Ind. (Carter) 281; compare *Meeker v. Van Rensselaer*, 15 Wend. 397. Where recording is not required by charter or law, resolutions of a council are admissible in evidence, although not recorded. *Darlington v. Commonwealth*, 41 Pa. St. 68. See *post*, sec. 310; *Louisville v. McKegney*, 7 Bush (Ky.), 651, construing charter as to requisites of the journal required to be kept by each board of the council.

<sup>1</sup> *Proprietors of Church v. Slack*, 7 Cush. (Mass.) 226, 239 (1851); *Commonwealth v. Athearn*, 3 Mass. 285; *Rex v. Wildman*, 2 Strange, 879; *King v. Ingram*, 1 W. Bl. 50; *King v. Round*, 4 Ad. & El. 139; *Cranford v. Powell*, 2 Burr. 1013; *Rex v. Clapham*, 1 Wils. 305; 3 Bl. Com. 310; *Kimball v. Lamprey*, 19 N. H. 215 (1848), where the above authorities are cited and digested by *Gilchrist*, C. J.; *Taylor v. Henry*, 2 Pick. (Mass.) 397; *Parish, &c. v. Stearns*, 21 Pick. (Mass.) 148, 156; *Bates v. Plymouth*, 14 Gray (Mass.), 163; *Perkins v. Weston*, 3 Cush. (Mass.) 549.

*The following points have been ruled in respect to corporations in England:* If the custody of their documents belong to one of their officers in virtue of his office, the corporation cannot compel him to deliver them up, but may require that he submit them to their inspection whenever they think proper. *Reg. v. Ipswich*, 2 Ld. Raym. 1238; *Rex v. Pigram*, 2 Burr. 767; *Willc. 345*; *Glover*, 260. Sometimes the custody of these documents is entrusted to the town-clerk or other officer, merely as the servant of the corporation, in which case they may ap-

point another to receive them; and if they are not delivered over after demand, the corporation may obtain possession of them by an action of *detinue*, or the court will compel a delivery by *mandamus*. *Ib.* If the predecessor in office, or, he being dead, his personal representative, or another person having possession of corporate documents under him, refuse to deliver them over to the successor or the corporation, on a proper application, the court will grant a *mandamus* to compel him to do so. *Rex v. Nottingham*, 1 Sid. 31; *Anonymous*, 1 Barnard. 402; *Willc. 345*; *Glover*, 260. This writ is said, indeed, to lie to any person, whether stranger or corporator, who happens to be in possession of the books of a corporation, and who refuses to deliver them up. *Proprietors of Church v. Slack*, 7 Cush. (Mass.) 226 (1851) *per Fletcher*, J.; *Rex v. Ingram*, 1 W. Bl. 50; *Willc. 246*; *Glover*, 231; *post*, chap. xx.

<sup>2</sup> *Parish, &c. v. Stearns*, 21 Pick. (Mass.) 148; *School District v. Lord*, 44 Me. 374 (replevin for records of district). The court, holding that *replevin* would lie, say: "The action is, therefore, rightfully brought, and may be maintained if the defendant was not the legal clerk of the district." *Per Rice*, J., 44 Me. 374, 384. The right or title of an office cannot be determined by a civil action between the respective claimants, as by an action of replevin for the official books and papers, and until the issue as to the right is determined, by *quo warranto* or other proper proceeding, no suit in replevin can be maintained by one claimant against the other for the possession of the appurtenances of the office: *Desmond v. McCarty*, 17 Iowa, 525. In *La Grange v. State Treasurer*, 24 Mich. 466,

§ 303 (240). **Inspection of Records and Papers.**—Concerning the right to *inspect corporate documents and papers*, the following points have been ruled as stated by Mr. Willcock: Every *corporator has a right to inspect* all the records, books, and other documents of the corporation, upon all proper occasions; and if, upon application for that purpose, the officer who has the custody refuse to show them, the court will grant a *mandamus* to enforce his right.<sup>1</sup> One who has a *prima facie title to a corporate office* has a right to inspect such documents as relate to that title, and may obtain a *mandamus* for this purpose before any suit has been instituted.<sup>2</sup> A corporator has a *right* to inspect these documents, to obtain information as to his rights, whether in dispute with a stranger or the corporation itself, or any of its members.<sup>3</sup> When the corporator's application to inspect is founded on his general right, he has a *mandamus*, but when it is founded on a suit pending, he obtains a rule.<sup>4</sup> In an action by one corporation against another, rules were made absolute for each corporation to inspect so much of the books and records as related to the subject in dispute.<sup>5</sup> The *motion for the rule to inspect* and to have copies should be supported by affidavits showing the foundation of the claim, the application, the proper officer, and his

the court decided that replevin does not lie for papers filed in a public office. *Post*, sec. 848.

<sup>1</sup> *Rex v. Shelley*, 3 Term R. 142; *Rex v. Babb*, *Id.* 580; *Harrison v. Williams*, 3 Barn. & Cress. 162; *Rogers v. Jones*, 5 D. & R. 484; *Willc.* 347; *Glover*, 262. *Any person* sufficiently interested is entitled to inspect entries in books of public corporations relating to public matters of the corporation, where the evidence is required in a civil action. *Grant, Corp.* 311. In *People v. Cornell*, 47 Barb. (N. Y.) 329, it is held that a corporator without any special or private interest has the right to inspect and take copies of all public documents and records, under reasonable restrictions to secure the safety of the originals.

<sup>2</sup> *Rex v. Newcastle*, 2 Stra. 1223; *Rex v. Lucas*, 10 East, 235; *Rex v. Purnell*, 1 Wils. 242; *Rex v. Bridgeman*, 2 Str. 1203; *People v. Mott*, 1 How. Pr. (N. Y.) 247; *Cockburn v. Bank*, 13 La. An. 289; *People v. Walker*, 9 Mich. 328; *People v. Cornell*, 47 Barb. (N. Y.) 329; *post*, chap. xx.

<sup>3</sup> *Edwards v. Vesey*, Cas. temp. Hardw. 128; *Rex v. Babb*, 3 Term R. 580; *Rex v.*

*Bridgeman*, 2 Stra. 1203; *Grant on Corp.* 312.

In England the right to inspect the auditor's report extended to "any inhabitant or ratepayer." The difference between an inhabitant and a ratepayer is that "inhabitant" means a resident, whether a ratepayer or not, and that a "ratepayer" is a person who pays taxes, whether a resident or not. *The King v. North Curry*, 4 Barn. & Cress. 961. Mere colorable residence is insufficient to constitute a person an inhabitant. *The King v. Sargent*, 5 Term R. 466; *The King v. Duke of Richmond*, 6 Term R. 560; *Bruce v. Bruce*, 2 B. & P. 229, note; *The King v. Mitchell*, 10 East, 511; *Whithorn v. Thomas*, 7 M. & G. 1. The English Municipal Corporations Act 1882, sec. 233, provides that any burgess may inspect the proceedings of the council on payment of a fee of one shilling, and may make copy thereof; may also inspect the treasurer's accounts and Freeman's Roll.

<sup>4</sup> *Rex v. Shelley*, 3 Term R. 142.

<sup>5</sup> *Mayor of London v. Lynn Regis*, 1 H. Bl. 206; *Mayor, &c. of Southampton v. Graves*, 8 Term R. 592.

refusal. The rule will require the expense attending obedience to be borne by the applicant, and will, in proper cases, allow the officer a remuneration for his trouble. If the officer disobey, without sufficient reason, the rule to allow an inspection or to give copy of, or to produce corporate documents, the court will grant an attachment against him.<sup>1</sup>

§ 304 (241). **Records as Evidence for the Corporation.**—A public or municipal corporation, required by law to keep a record of its public, or official proceedings, *may itself use such records as evidence* in suits to which it is a party; but the records must first be properly authenticated.<sup>2</sup> Indeed, in actions generally, including

<sup>1</sup> Willc. 352, 353; Grant, 311 *et seq.* See, also, *People v. Mott*, 1 How. Pr. (N. Y.) 247; *Cockburn v. Bank*, 13 La. An. 289; *People v. Walker*, 9 Mich. 328.

<sup>2</sup> *School District v. Blakeslee*, 13 Conn. 227 (1839); *Denning v. Roome*, 6 Wend. (N. Y.) 651; *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 205; *State v. Van Winkle*, 1 Dutch. (N. J.) 73; *McFarlan v. Triton Ins. Co.*, 4 Denio (N. Y.), 392; *Highland Turnp. Co. v. McKean*, 11 Johns. (N. Y.) 154. *Denning v. Roome*, above cited, holds that the *original minutes* or records of the corporation of a city were competent evidence of corporate acts, without further proof of their verity. Records of corporation held admissible, though not required by law to be kept, and, where defective, explainable by parol evidence. *Gearhart v. Dixon*, 1 Pa. St. 224 (1845); *Adams v. Mack*, 3 N. H. 493, 499, *per Richardson, C. J.*

*The following points have been decided respecting English corporations:* Where charters or corporation books are to be given in evidence, being records or instruments of a *public nature*, they may themselves be produced; and examined copies of their contents may also be given in evidence. The Court of King's Bench will not make a rule to produce the originals, unless it be shown by affidavit that a new entry, rasure, or some other circumstance, renders an inspection necessary. To give books this public character, it must appear, if they be questioned, that they have been publicly kept, and that entries have been made by the proper officer; not but that entries made by other persons

may be good, if the town-clerk be sick or refuses to attend—which, however, must be proved, and the reason why they were not made by the proper officer shown. *Rex v. Mothersell*, 1 Stra. 93; *Brocas v. Mayor, &c. of London*, 1 Stra. 307; *Rex v. Gwyn, Mayor, &c.*, 1 Stra. 401; Willc. 343; *Glover*, 258; *Rex v. Smith*, 1 Stra. 126; *Grant*, 318. Whoever produces the book must establish its authority before he delivers it in, and may be required to show where it has been kept, and how it came into his possession. *Rex v. Mothersell*, 1 Stra. 93; *Rex v. Thetford*, 12 Vin. Abr. 90, p. 16; Willc. 344; *Glover*, 258. A book containing minutes of some corporate acts which occurred ten years ago, entirely written by the relator's clerk, who was not an officer of the corporation, and appearing never to have been kept among, or esteemed as, one of the corporate documents, or even seen before the present application for an information, is not admissible as a corporate document. *Rex v. Mothersell*, 1 Stra. 93. Nor is the copy of a letter made fifty years ago and found in the corporation chest; but the original must be first accounted for, as though it had been found in the possession of a private person. *Rex v. Gwyn*, 1 Stra. 401. Nor are entries of a *private nature*, in the public books of a corporation, evidence for the corporation in support of a right which they claim, for this were allowing the party to fabricate evidence for themselves. *Rex v. Debenham*, 2 B. & Ald. 187; *Marriage v. Lawrence*, 3 B. & Ald. 144; *Grant on Corp.* 318, 319, and cases; 2 Phil. Ev. 122; *Angell &*

actions against agents or officers of the corporation, as individuals, the *original minutes or records* of the corporation are competent evidence of the acts and proceedings of the corporation. *Duly authenticated copies* have often been received in evidence where the original document or proceeding was of a public nature.<sup>1</sup>

§ 305 (242). **Evidential Force of Committee's Report.** — An admission by a corporation of a fact or of a liability, duly and properly made, is, of course, evidence against it. But a municipal corporation, by *accepting*, that is, *receiving the report of a committee*

Ames Corp. sec. 679; Willc. 344. The *English Municipal Corporations Act* 1882, sec. 22, provides that "a minute of the proceedings at a meeting of the council," duly signed as specified in the act, "shall be received in evidence without further proof;" and are presumed to be regular and valid, "until the contrary is proved." How such proof must be made, see Reg. v. Thomas, 8 A. & E. 183.

<sup>1</sup> Denning v. Roome, 6 Wend. (N. Y.) 651 (1831); citing Owings v. Speed, 5 Wheat. 424; Rex v. Mothersell, 1 Stra. 93; 12 Vin. Abr. 90, pl. 16. See also, People v. Adams, 9 Wend. (N. Y.) 333; Wood v. Jefferson County Bank, 9 Cow. (N. Y.) 194, 205; Angell & Ames on Corp. sec. 679; Turnpike Co. v. McKean, 11 Johns. (N. Y.) 154; People v. Murray, 57 Mich. 396; O'Mally v. McGinn, 53 Wis. 353. In Denning v. Roome, *supra*, the defendant was sued in his *individual capacity* for removing, by order of the city council, a certain fence erected by the plaintiff. The defendant (although it was argued that, being the agent of the corporation, the latter should be considered as the *party* and its own records as incompetent in its own favor to justify its acts) was allowed to show by the records of the corporation that the fence was on a portion of the public street.

The clerk of a city or town is, by law, the proper certifying officer to authenticate copies of the votes and ordinances thereof. Such copies are admissible in evidence without preliminary proof, as in ordinary instruments, of the genuineness of the clerk's signature, but are, of course, only *prima facie* evidence; and they may be shown to be inaccurate, false, or forged. Commonwealth v. Chase, 6

Cush. (Mass.) 248 (1850). Where the original document is of a public nature, and would be evidence if produced, it is not necessary to show the document itself, for it may be required at many places at the same time; for that reason an immediate sworn copy, made by the proper officer, will be admitted. Rex v. Lord George Gordon, Doug. 593; 1 Phil. Ev. 405; Willc. 344; Glover, 259. Grant, 318, lays down the rule generally, that sworn copies of public entries in books of public corporations are admissible wherever the originals would be, and the corporation will not be compelled to produce their books in court except for reasons shown. It has, however, been held that the by-laws of a corporation, in the absence of special provision, must be proved by the production of the by-laws themselves, as these are the primary evidence. Lombard v. Aldrich, 8 N. H. 31; Moor v. Newfield, 4 Greenl. (Me.) 44; Hallowell Bank v. Hamlin, 14 Mass. 178. So, of the votes of a corporation, the record is the best evidence. Haven v. Asylum, 13 N. H. 532. See also Manning v. Parish, 6 Pick. (Mass.) 6; Taylor v. Henry, 2 Pick. (Mass.) 403; Green v. Indianapolis, 25 Ind. 490. It may be remarked that there are statutes in various States under which certified copies would be receivable in evidence instead of the originals. Licenses from a city or town authorizing persons to pursue particular employments, &c., need not be in writing. Boston v. Shaffer, 9 Pick. (Mass.) 415 (1830). An ordinance of a city of *another State* may be proved by producing the book in which it is recorded, or by a sworn copy. Louisville, N. A., & Chic. Ry. Co. v. Shires, 108 Ill. 617.

of inquiry, does not admit the truth of the facts stated therein; and such a report, though accepted by a vote of the corporation, is not admissible in evidence against it.<sup>1</sup> In an action of *assumpsit* against a town corporation, to support his cause of action, the plaintiff produced the books of the corporation, by which it appeared that the sum demanded in the declaration had been allowed by the council to the plaintiff on the 5th of September, on final settlement, at which time the plaintiff was present and assented to the settlement. The defendant contended that the resolution had been passed by mistake, and offered to show, by the same books, the passage, *three days afterwards*, in the plaintiff's absence, of a resolution rescinding the amount of the plaintiff's account. It was held that the subsequent resolution was not competent evidence, the court basing this opinion on the proposition that the books of a corporation are evidence against it, but not in its favor, in an action against the corporation by a stranger.<sup>2</sup>

<sup>1</sup> *Dudley v. Weston*, 1 Met. (Mass.) 477 (1846); followed by *Collins v. Dorchester*, 6 Cush. (Mass.) 396 (1850); and both relating to defective highways. In *The King v. Hardwick*, 11 East, 578, a rated parishioner made a confession, which was admitted in evidence against the parish, on the ground that the parish was an aggregate corporation or company, of which he was a member; compare *Mayor, &c. v. Long*, 1 Camp. 22. But this is not the law in this country, and it may be safely laid down that the admission of a corporator cannot be received against the body. *Hartford Bank v. Hart*, 3 Day (Conn.), 493, denying *The King v. Hardwick*, *supra*; *Osgood v. Manhattan Co.*, 3 Cow. (N. Y.) 612, 623. But the admission of an officer when made in the ordinary course of his official duty, and within the scope of his powers, may be admissible against the corporation. *Peyton v. Hospital*, 3 C. & P. 363; *Angell & Ames on Corp.* sec. 309; *Ib.* sec. 659; *ante*, sec. 237, note, and cases.

*Notice to corporator or member* is not notice to the corporation; it should be formally given as such to the authorized head or proper officer. *Powles v. Page*, 3 Com. B. 31; *Edwards v. Railroad Co.*, 1 Myl. & Cr. 659; *Grant Corp.* 315. *Lancey* brought an action for *libel* against the mayor and clerk of the city of Bangor for the following statement contained in their annual report: "Balance due from John Lancey, Collector, \$6,004.50." The balance was shown to be less. It was held that there was no presumption of law that the officers of a city or town knew the contents of the city records, and no rule of law obliging them to be acquainted therewith; and unless the defendants made the publication maliciously they were entitled to a verdict. *Lancey v. Bryant*, 30 Me. (10 Shep.) 466 (1849); *ante*, sec. 237, note, and cases.

<sup>2</sup> *Mayor v. Wright*, 2 Port. (Ala.) 230 (1835), citing 1 Stark Ev. 292; but is not the proposition too broadly stated?

## CHAPTER XII.

## MUNICIPAL ORDINANCES OR BY-LAWS.

§ 306 (243). **Subject outlined.** — This subject will be considered under the following heads : —

1. Definition, General Nature and Common-Law Requisites of Ordinances — secs. 307–330.

2. Of the Signing, Publication, and Recording — secs. 331–335.

3. Of the Power to impose Fines, Penalties, and Forfeitures — secs. 336–353.

4. On Whom Binding, and Notice thereof — secs. 354–356.

5. Ordinances relating to the Licensing, Taxing, and Regulation of Amusements and Occupations, including the Sale of Intoxicating Liquors — secs. 357–365.

6. Ordinances relating to Public Offences — secs. 366–368.

7. Ordinances relating to the Public Health, Safety, and Convenience : Herein of Hospitals, Cemeteries, and Burials ; Nuisances ; Markets and Inspection Regulations ; Dangerous Occupations and Practices ; and of the Police Power and General Welfare Clauses in Charters — secs. 369–407.

8. Mode of enforcing Ordinances : Herein of Actions and Prosecutions, and their Nature ; Mode of pleading Ordinances ; Requisites of Complaints to enforce Ordinances ; Construction, Defences, Evidence, &c. — secs. 408–422.

*Definition, General Nature, and Common-Law Requisites of Ordinances.*

§ 307 (244). **Definition.** — Under the general term of “ordinances” have been sometimes included all the regulations by which a corporation is itself governed, including special charter or statute regulations, as well as by-laws. In this country, the term “ordinance” is not usually applied, if ever, to charters, or acts of the legislature respecting municipal corporations regulating their powers and mode of action, but is limited in its application to the acts or regulations, in the nature of local laws, passed by the proper assembly or governing body of the corporation. Indeed, in general and professional use the term “ordinance” is almost, if not quite, equivalent in meaning

to the term "by-law," and is the word most generally used to denote the by-laws adopted by municipal corporations. According to Lord Coke, the word "by" or "bye" signifies a habitation; and thence a by-law in England, and a by-law or ordinance in this country, may be defined to be the law of the inhabitants of the corporate place or district, made by themselves or the authorized body, in distinction from the general law of the country or the statute law of the particular State.<sup>1</sup>

<sup>1</sup> Wille. 73; 2 Kyd, 95, 98.

*Definition and Nature of Ordinances or By-Laws.*—In a case in *Massachusetts*, denying to towns in that State power under the statute to prohibit by ordinance the sale of intoxicating liquor, Mr. Chief Justice *Shaw* observed that the term "by-law" has a limited and peculiar meaning, and is used to designate such ordinances or regulations which a corporation, as one of its legal incidents, has power to make with respect to its own members and its own concerns. In respect to municipal and quasi corporations this meaning has been somewhat extended, but even here the word is used to designate such ordinances and regulations as have reference to legitimate and proper municipal or corporate purposes. There is a broad distinction between the power of a public corporation to make "by-laws" and the general power to make "laws:" authority to make the former does not include the power to legislate upon general subjects. *Commonwealth v. Turner*, 1 Cush. (Mass.) 493. See also *Taylor v. Lambertville*, 43 N. J. Eq. (16 Stew.) 107. "It means a local law prescribing a general and permanent rule." *Elliott, J., Citizens' Gas. & M. Co. v. Elwood*, 114 Ind. 332 (1887). A municipal by-law, according to the definition of a distinguished English judge, is a rule obligatory over a particular district, not being at variance with the general laws of the realm, and being reasonable and adapted to the purposes of the corporation; and any rule or ordinance of a permanent character which a corporation is empowered to make, either by the common or statute law, is a by-law. *Per Parke, B., Gosling v. Veley*, 19 L. J. (N. S.) Q. B. 135.

*Resolutions and Ordinances discriminated.*—A resolution is an order of the

council of a special and temporary character; an ordinance prescribes a permanent rule of conduct or government. *Blanchard v. Bissell*, 11 Ohio St. 96, 103, *per Scott, J.* Where the charter commits the decision of a matter to the council and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by an ordinance. *State v. Jersey City*, 3 Dutch. (N. J.) 493; *Merch. Union B. Wire Co. v. Chicago, B. & Q. Ry. Co.*, 70 Iowa, 105; *Butler v. Passaic*, 44 N. J. L. 171. But if the organic law requires an act to be done by ordinance, or if such requirement is implied by necessary inference, a resolution is not sufficient. *Newman v. Emporia*, 32 Kan. 456; *Hunt v. Lambertville*, 45 N. J. L. (16 Vroom) 279 (a resolution granting authority to build a sewer set aside).

Resolution or vote held equivalent to formal ordinance in a case where the latter was not expressly required by the charter or statute. *Merch. Union B. Wire Co. v. Chicago, B. & Q. R. Co.*, 70 Iowa, 105. In *State v. Bayonne*, 6 Vroom (35 N. J. L.), 335, resolutions and ordinances are discriminated, and the latter said to require more solemnity than the former. A resolution adopted by a city council, not approved by the mayor, and not published in the manner required by the charter, has not the effect of an ordinance. *Central v. Sears*, 2 Col. 588 (1875). The legislative powers of a city council, as in fixing the compensation of city officers (it was held, construing the charter), must be exercised by ordinance, when this is intended to be permanent. *Id.* A resolution has ordinarily the same effect as an ordinance, as both are legislative acts. *Sower v. Philadelphia*, 35 Pa. St. 231 (1860); *Gas Co. v. San Francisco*,



§ 308 (245). **Authority delegated to Municipalities; Nature of Ordinances; Repeal.** — Although the proposition that the legislature of a State is alone competent to make laws is true, yet it is also settled that it is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances,<sup>1</sup> with appro-

6 Cal. 190. Where the power to make ordinances and by-laws is general, and no form in which these shall be enacted or passed is prescribed, it was held that an ordinance containing a prohibition and annexing a penalty was valid, notwithstanding it purported by its terms to be a resolution. In substance it was an ordinance or regulation, and the form in which it was passed did not make it void. *Municipality v. Cutting*, 4 La. An. 335 (1849). Where a city has power, by charter, to make "ordinances, rules, resolutions, and by-laws," which are required to be passed by the vote of a majority of the council and signed by the mayor, any form of procedure may be adopted if it appears upon the record in a permanent form, — as, by a record in the minutes of an oral motion with the vote thereon. *Green Bay v. Brauns*, 50 Wis. 204. By one section of the charter the council was authorized to make "by-laws, ordinances, resolutions, and regulations," and by another "by-laws and ordinances" were to be submitted to the mayor for his approval, and it was held that there was no such distinction as to require that "by-laws and ordinances" must, and "regulations and resolutions" need not, be submitted to the mayor, to be approved by him. *Kepner v. Commonwealth*, 40 Pa. St. 124. The words "regulation," "resolution," and "ordinance," as used in the charter, defined by *Lowrie*, C. J. 16. *How construed.* The charter of a city bears the same general relation to the ordinances of a city that the Constitution of a State bears to its statutes, and the general rules applicable to unconstitutional statutes may be applied in construing ordinances. *Quinette v. St. Louis*, 76 Mo. 402.

*Construction of particular charter provisions when corporate purpose may be expressed in the form of a resolution.* — *State v. Elizabeth* (acceptance of dedication), 37 N. J. L., 432; *State*  
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*v. Jersey City* (building sewers), 3 Dutch. (N. J.) 493; *Ib.* 185, 196; *State v. Jersey City* (signature of mayor), 1 Vroom (30 N. J. L.), 148; *State v. Trenton*, 7 Vroom (36 N. J. L.), 499, 503. *Instances where an ordinance was held essential.* *State v. Bayonne* (grading street), 6 Vroom (35 N. J. L.), 335; *Ib.* 205; *Cross v. Morristown* (alteration of width of street and sidewalk), 3 C. E. Green (N. J.), 305; *State v. Bergen* (appointment of commissioners to assess damages), 4 Vroom (33 N. J. L.), 39, 72; *Paterson v. Barnet*, 46 N. J. L. (17 Vroom) 62; *ante*, sec. 258, note; sec. 270, note.

*Mode of Exercising Power.* — Where the power to do certain acts or pass certain ordinances is conferred upon the council, but the particular mode of exercising the power is not prescribed, this may be done by ordinance, and any mode may be adopted which does not infringe the charter or general law of the land. Thus, for example, power was given to a city "to levy and collect a special tax," not specifying the mode of collection. *Held*, that an ordinance requiring the mayor to enforce the collection of the tax by suit in the nature of an action for debt, was valid, as it did not violate the charter or the general law. *Cincinnati v. Gwynne*, 10 Ohio, 192; *Markle v. Akron*, 14 Ohio, 586 (1846). Prescribed mode essential. *Cross v. Morristown*, 18 N. J. Eq. 305; *Anderson v. O'Conner*, 98 Ind. 168; *post*, chap. xix.

<sup>1</sup> *Perdue v. Ellis*, 18 Ga. 586 (1855); *St. Paul v. Coulter*, 12 Minn. 41 (1866); *Commonwealth v. Duquet*, 2 Yeates (Pa.), 493; *Hill v. Decatur*, 22 Ga. 203; *State v. Clark*, 8 Fost. (28 N. H.) 176 (1854); *Milne v. Davidson*, 5 Martin, N. s. (La.) 586; *Markle v. Akron*, 14 Ohio, 586, 590 (1846); *Mayor, &c. v. Morgan*, 7 Martin, N. s. (La.) 1, *per Martin*, J.; *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382 (1869); *Metcalf v. St. Louis*, 11 Mo. 103 (1847). That such a power may be delegated to

appropriate sanctions, which, when authorized, have the force, in favor of the municipality and against persons bound thereby, of laws passed by the legislature of the State.<sup>1</sup> A penalty imposed by an ordinance

municipal corporations is admitted even in those States which deny the validity of what are known as *Local Option Laws*. Wall, *In re*, 48 Cal. 279 (1874); s. c. 17 Am. Rep. 425; *ante*, sec. 44, note; *Groversville v. Howell* (local option as to sale of intoxicating liquors), 70 N. Y. 287 (1877); *Gilbert Elevated Railway Co., In re*, 70 N. Y. 361 (1877); *Covington v. East St. Louis*, 78 Ill. 548 (1875). In *Strauss v. Pontiac*, 40 Ill. 301 (1866), the Supreme Court held that a provision in a town charter forbidding any person to do a certain act, fixing the amount of fine and prescribing the penalty, was a complete enactment of itself; that an ordinance to the same effect was void; and that a party could be prosecuted only under the charter, and not under the ordinance. In view of the general authority given in the same charter to make all ordinances necessary to carry into effect the powers granted in the charter, the correctness of this decision may admit of fair debate, although it is undoubtedly true that no ordinance is necessary where the prohibition in the charter is complete, the penalty fixed, and the remedy prescribed. *Ashton v. Ellsworth*, 48 Ill. 299.

The subject of the *power of the legislature to delegate the legislative function to municipalities* was considered in an able opinion by Chief Justice Doe, in *State, ex rel. v. Hayes*, 61 N. H. 264, 314 (1881), in which he reviews the authorities *in extenso*. The facts, briefly stated, were that the legislature had submitted a proposition as to whether an act authorizing shareholders in corporations to cast all their votes for one candidate for director or to distribute them among two or more candidates, should become a law, to the vote of the people of the State, voting in their several towns and wards. The election having been held and the law having been declared adopted and put into effect, the validity of the proceeding was tested by *quo warranto* proceedings against one who had been declared elected a director of a railroad company. It was held that the act

was intended to be a delegation of legislative power, and that, while the principle of local government authorizes the grant of limited powers of local legislation to municipalities, the power of general State legislation cannot be so delegated. See also *Bowles v. Landaff*, 59 N. H. 164, and *Gould v. Raymond*, *Id.* 260. Council may order sewer to be built by a committee. *Collins v. Holyoke*, 146 Mass. 298 (1888). See *Dorey v. Boston*, *Id.* 336, 339, and cases. *Ante*, secs. 97, 289.

<sup>1</sup> *Heland v. Lowell*, 3 Allen (Mass.), 407 (1862); *Brick Presb. Church v. City, &c.*, 5 Cow. 538; *St. Louis v. Boffinger*, 19 Mo. 13, 15, *per Gamble, J.*; *St. Louis v. Bank*, 49 Mo. 574; *Jones v. Ins. Co.*, 2 Daly (N. Y.), 307; *McDermott v. Board of Police*, 5 Abb. Pr. (N. Y.) 422 (1857); *Mason v. Shawneetown*, 77 Ill. 533 (1875); *Des Moines Gas Co. v. Des Moines (city of)*, 44 Iowa, 508; s. c. 24 Am. Rep. 756, citing text; *State v. Tryon*, 39 Conn. 183 (1872); *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396, citing text; *Bearden v. Madison*, 73 Ga. 184; *St. Johnsbury v. Thompson*, 59 Vt. 300; *Starr v. Burlington*, 45 Iowa, 87. A city council is "a miniature general assembly, and their authorized ordinances have the force of laws passed by the legislature of the State." *Per Scott, J.*, *Taylor v. Carondelet* (forfeiture clause in lease), 22 Mo. 105 (1855); *St. Louis v. Foster*, 52 Mo. 513 (1873). In *Hopkins v. Mayor of Swansea*, 4 M. & W. 621, 640, Lord Abinger said: "The by-law has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an act of parliament has upon the subjects at large." Valid ordinances of corporations are as binding on the corporators and inhabitants of the place as the general laws of the State upon the citizens at large. *Milne v. Davidson*, 5 Martin n. s. (La.) 586. And therefore it has been held that contracts between the inhabitants of a city, in violation of the express provisions of a valid ordinance of a municipal corporation, are illegal, and cannot be enforced. *Milne v. Davidson* (lease of house

authorized by the legislature for the doing of certain specified acts amounts to a prohibition, and the prohibited acts become thereby unlawful.<sup>1</sup>

§ 309 (246). **Ordinances must be adopted by Proper Body and in the Prescribed Mode.**—Ordinances being among the most important and solemn acts of a corporation, it is essential to their validity that they shall be *adopted by the proper body*, duly assembled, and in the manner prescribed by the charter.<sup>2</sup> What is necessary to constitute

for private hospital), 5 Martin, *supra* (1827); Heland v. Lowell, 3 Allen (Mass.), 407 (1867); but compare Baker v. Portland, 58 Me. 199; n. c. 10 Am. Law Reg. (N. S.) 559, and see Judge Redfield's note. And see also Heeny v. Sprague, 11 R. I. 456 (1877); s. c. 23 Am. Rep. 502, holding that no private action for damages impliedly exists in favor of a person injured by a breach of duty imposed by a municipal by-law against the person who violated the by-law. A distinction between by-laws and statutes suggested and discussed by *Durfee*, C. J.; see Johnson v. Simonton, 43 Cal. 242 (1872). The courts will not enjoin the passage of unauthorized ordinances, and will ordinarily act only when steps are taken to make them available. Chicago v. Evans, 24 Ill. 52 (1860); Smith v. McCarthy, 56 Pa. St. 359; Des Moines Gas Co. v. Des Moines (city of), 44 Iowa, 505 (1870); s. c. 24 Am. Rep. 756, distinguishing Davis v. Mayor, 14 N. Y. 506; People v. Sturtevant, 9 N. Y. 263. *Ante*, sec. 197, note; *post*, chap. xxii. But if a party is injuriously affected by an ordinance, he may have its validity judicially determined before it is attempted to be executed. State v. Paterson, 34 N. J. Law, 163; State v. Jersey City, *Id.* 31, 390 (1870). But see Sheridan v. Colvin, 78 Ill. 237.

The jurisdiction of every council is not only to be confined to the municipality the council represents, but is to be exercised, when not otherwise provided for, by by-law. When a corporation is duly erected, the law tacitly annexes to it the power of making by-laws or private statutes. This power is included in every act of incorporation; for, as is quaintly observed by Blackstone, "as natural reason is given to the natural body for the gov-

erning it, so by-laws or statutes are a sort of political reason to govern the body politic." 1 Bl. Com. 476. Though the power to make by-laws is unquestionably an incident of every corporation, it is rarely left to implication; but is usually, as in the present case, conferred by the express terms of the act of parliament. A by-law is a rule obligatory over a particular district, not being at variance with the general laws, and being reasonably adapted to the purposes of the corporation. Gosling v. Velez *et al.*, 19 L. J. (N. S.) Q. B. 135. Hopkins v. Swansea, 4 M. & W. 621; The Queen v. Osler, 32 Upper Can. Q. B. 324. The courts upon general principles recognize judicially what municipal councils are competent to do, and hold that it is not necessary for them to recite in a by-law all that is requisite to show that they have proceeded regularly in passing it. Grierson v. Ontario, 9 Upper Can. Q. B. 623; Fisher v. Vaughan, 10 Upper Can. Q. B. 492; The King v. Harrison, 3 Burr. 1328; Methodist Prot. Church v. Baltimore, 6 Gill (Md.), 394; Stuyvesant v. New York, 7 Cow. (N. Y.) 588; Harr. Munic. Manual, 4th ed.

<sup>1</sup> Johnson v. Simonton (swill milk ordinance of San Francisco), 43 Cal. 242 (1872). Thus a city ordinance, duly authorized, imposing a penalty for feeding distillery slops to cows, and also for vending the milk of cows so fed, amounts to an authoritative prohibition in both respects; and the acts thus prohibited are illegal. *Id.*

The code of Iowa (sec. 489), requires that "no ordinance shall contain more than one subject, which shall be *clearly expressed in its title*." Under it an ordinance entitled "*Regulating the use and sale of intoxicating liquors*" was declared

a valid corporate meeting, and the manner of performing valid corporate acts, are subjects treated of in another chapter.<sup>1</sup> When the *mode of enacting ordinances is prescribed*, it must be pursued. Thus, if the charter provides that no by-law shall be passed unless introduced at a previous regular meeting, this is a restriction on the power, and must be observed; and, accordingly, an ordinance for opening a street was adjudged void, on the ground that the name of one of the commissioners was changed without laying the ordinance over until another meeting.<sup>2</sup> So where by the charter the *mayor is*

void, its subject being entirely *prohibitory*. *Town of Cantril v. Sainer*, 59 Iowa, 26. See also *Dempsey v. Burlington*, 66 Iowa, 687. There is a similar statutory provision in *Kansas*. *Smith v. Emporia*, 27 Kan. 528; *Stebbins v. Mayer*, 38 Kan. 573. See, *ante*, secs. 51, 270-287.

<sup>1</sup> *Ante*, chap. x.

<sup>2</sup> *State v. Bergen*, 33 N. J. Law, 39 (1868), distinguished from *State v. Jersey City*, 2 Dutch. (N. J.) 448, where the variance was immaterial. *New Orleans v. Brooks*, 36 La. An. 641; *Danville v. Shelton*, 76 Va. 325. See as to constitutional requirement that bills shall be read on successive days before their passage, *Cooley Const. Lim.* 139, and cases there cited. Construction of similar restriction requiring previous publication. *Douglass, In re*, 46 N. Y. 42; *N. Y. &c. School, In re*, 47 N. Y. 556; *Dubuque v. Wooton*, 28 Iowa, 571. Where a statute requires that no vote shall be taken upon an assessment ordinance or resolution until it has been published three days, a resolution passed without such prior publication was held illegal, and the assessment founded upon it void. *Addison Smith, In re*, 52 N. Y. 526. The provision is held to be mandatory. *Phillips, In re*, 60 N. Y. 16; *Little, In re*, 60 N. Y. 343; *Anderson, In re*, 60 N. Y. 457; *Douglass, In re*, 46 N. Y. 42; *State v. Hoboken*, 38 N. J. L. 110; *State v. Smith*, 22 Minn. 218. Under a provision that no act or ordinance of any board of trustees of a town should be valid until the certificates of their election should be filed, the filing to be within ten days after the election, it was held that the effect of filing the certificates a year or more after the election was to legalize and validate ordinances previously made for street improvements, and to authorize the

recovery of assessments provided for by them. *Jennings v. Fisher*, 103 Ind. 112, overruling *Ligonier v. Ackerman*, 46 Ind. 552, and *Pratt v. Luther*, 45 Ind. 250. Where the statute authorized an ordinance prohibiting the erection of wooden buildings in any block, upon the *petition of two-thirds* of the property owners thereon, an ordinance adopted without a petition being first made was declared void. *Des Moines v. Gilchrist*, 67 Iowa, 210; compare *Keokuk v. Scroggs*, 39 Iowa, 447. Where, under a rule of a city council, a councilman was not allowed to vote upon questions in which he was directly interested, an ordinance passed by the lowest number necessary, of which one vote was cast by an interested councilman, was declared invalid. *Buffington Wheel Co. v. Burnham*, 60 Iowa, 493. By the Iowa code, sec. 489, an ordinance containing more than one subject is void. Under this clause an ordinance, the first section of which vacated an alley, and the second granted the vacated land to a private person, was held to be valid, its purpose being to transfer the title. *Dempsey v. Burlington*, 66 Iowa, 687. Where the law required the *reading of the ordinance on three different days*, the fact that the third reading was after the annual election and entrance upon office of a new mayor and four new aldermen, was held to be a sufficient compliance with it. *McGraw v. Whitson*, 69 Iowa, 348. The readings may be at "adjourned" meetings; three general meetings of the council are not intended. *Cutcomp v. Utt*, 60 Iowa, 156. Where the minutes of the council showed the adoption of a motion to reduce certain licenses, and stated that "the mayor was instructed to prepare an ordinance covering said changes," it was held, on an application for a *man-*

*part of the law-making power*, his concurrence in legislative action is essential to its validity.<sup>1</sup> Municipal ordinances, otherwise valid, may, like an act of the legislature, be adopted *to take effect in future* and upon the happening of a contingent event.<sup>2</sup> The *ordaining clause of an ordinance* has been held, under the circumstances stated in the note, not to be essential to its validity, although the charter contains a provision requiring such a clause and prescribing the form, the court considering the provision to be directory only.<sup>3</sup>

§ 310 (247). **Evidence of Adoption of Ordinances.**—In the absence of required *record evidence of the passage of an ordinance*, it is not

*damus* to compel the issue of a license at the reduced rate, that the record did not show a complete legislative act, and that the resolution did not effect a change in the rate of license. *Jones v. McAlpine*, 64 Ala. 511.

<sup>1</sup> *Saxton v. Beach*, 50 Mo. 488 (1872); *Saxton v. St. Joseph*, 60 Mo. 153 (1875); therefore a *resolution* without the mayor's signature ordering local improvements is a nullity. *Ib.*; *Irvin v. Devora*, 65 Mo. 625 (1877). The act of a mayor in announcing that a motion is lost does not amount to an adjudication, so as to prevent its being attacked collaterally. *Chariton v. Holliday*, 60 Iowa, 391. *Ante*, sec. 272 *et seq.*

<sup>2</sup> *Baltimore v. Clunet*, 23 Md. 449 (1865); *Northern C. R. Co. v. Baltimore*, 21 Md. 93 (1863); *State v. Kirkley*, 29 Md. 85 (1868); *ante*, sec. 44. See *Troy v. Atchison, &c. Railroad Co.*, 18 Kan. 70 (1874); *ante*, sec. 300, note. Another common but erroneous belief is, that a municipal council can by order or resolution do that which, if done through a by-law or ordinance, would be illegal. This it cannot do. No municipal council can do that informally which it has no power to do directly and formally. *Daniels v. Burford*, 10 Upper Can. Q. B. 478. A by-law, order, or resolution which revives an illegal by-law is of course itself illegal. *Canada Co. v. Oxford*, 9 Upper Can. Q. B. 567. An order or resolution duly signed and sealed is virtually a by-law or ordinance, but many orders and resolutions pass by mere vote, without being thus authenticated. The municipal rules of proceeding generally require more formal steps to be taken, in passing a by-law or ordinance, than in adopting an order or resolution.

Municipal corporations, however, may become liable as wrong-doers for things done by direction of the councils without by-laws. *Croft v. Peterborough*, 5 Upper Can. C. P. 35; *Nevill v. Ross*, 22 Upper Can. C. P. 487; *Darby v. Crowland*, 38 Upper Can. Q. B. 338; *Lewis v. City of Toronto*, 39 Upper Can. Q. B. 343. The power to make by-laws or ordinances necessarily supposes the power to enforce them by pecuniary penalties, competent and proportionable to the offence. In construing a by-law, &c., the court will look at the whole of it, to ascertain its meaning, and construe one part with another or other parts, so as, if possible, to give full effect to the whole. *Cameron and East Nissouri, In re*, 13 Upper Can. Q. B. 190.

<sup>3</sup> *St. Louis v. Foster*, 52 Mo. 513 (1873). The Supreme Court of *Missouri* having decided in the *Pacific Railroad v. Governor*, 23 Mo. 353, and *Cape Girardeau v. Riley*, 52 Mo. 424, that the validity of a statute, duly authenticated, could not be impeached by showing a departure from the forms prescribed in the Constitution in the passage of laws, applied the same principle to the passage of ordinances. Therefore, although the charter required that the style of ordinances shall be, "Be it ordained," &c., yet this is directory; and omitting the enacting clause, or using an imperfect enacting clause does not invalidate the ordinance. *St. Louis v. Foster, supra*. To same effect, *People v. Murray*, 57 Mich. 396. As to the conflicting decisions in respect to whether the forms prescribed in Constitutions to be observed in the enactment of laws are imperative or directory only, see *Cooley Const. Lim. chap. vi.*

competent, except possibly under peculiar circumstances, to establish its adoption by extrinsic testimony;<sup>1</sup> but where unanimity is necessary to legal authority to make an order, and an order is entered, it will be presumed, when the contrary does not appear, that it was made with the required unanimity.<sup>2</sup>

§ 311. **Motives for adopting Ordinances not subject to Judicial Inquiry.** — It is well settled that *the judicial branch of the government cannot institute an inquiry into the motives of the legislative department in the enactment of laws.* Such an inquiry would not only be impracticable in most cases, but the assumption and exercise of such a power would result in subordinating the legislature to the courts.<sup>3</sup> In analogy to this rule it is doubtless true that the courts will not, in general, inquire into the motives of the council in passing ordinances.<sup>4</sup> But it would be disastrous, as we think, to apply the analogy to its full extent. Municipal bodies, like the directories of private corporations, have too often shown themselves capable of using their powers fraudulently, for their own advantage or to the injury of others. We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, *may be impeached for fraud* at the instance of persons injured thereby.

§ 312 (248). **Same subject.** — Accordingly, in Ohio, in a case where the legislature chartered a gas company, reserving the power of control, and subsequently empowered the city council to regulate the price of gas, the court considered the intention to be to limit the

<sup>1</sup> Covington v. Ludlow, 1 Met. (Ky.) 295 (1858). See *ante*, secs. 297, 300, note, 304, note; *post*, sec. 335.

<sup>2</sup> Lexington v. Headley, 5 Bush (Ky.), 508 (1869); Covington v. Boyle, 6 Bush (Ky.), 204 (1869); McCormick v. Bay City, 23 Mich. 457 (1871); see Steckert v. East Saginaw, 22 Mich. 104; *post*, sec. 800. The final action of a city council, or other deliberative body, on any measure, is shown by its adjournment thereon, the public promulgation of its action, or subsequent proceedings inconsistent with a purpose to review. State v. Van Buskirk, 40 N. J. L. 463. In *Illinois* a book or pamphlet containing the ordinances of a municipal corporation and purporting to be published by its authority, is evidence of the passage and contents of the ordinances contained in it, and of their legal publication. Lindsay v. Chicago, 115 Ill.

120; *infra*, sec. 334. Where a record is silent as to proceedings required by law to be taken, — as that the yeas and nays shall be called, — no presumption arises that other proceedings than those mentioned in the record took place. Tracey v. The People, 6 Col. 151.

<sup>3</sup> Cooley Const. Lim. 186, 187, where many of the cases are collected.

<sup>4</sup> Freeport v. Marks, 59 Pa. St. 253; Buell v. Ball, 20 Iowa, 282 (collateral action between third persons). It being well settled that the courts may decide upon the reasonableness of ordinances, they will in general judge of these, whatever their purpose, by considering their nature and effect, rather than by instituting an inquiry into the motives of the members of the council; although where the latter is material and relevant, it may in the author's judgment be done.

company to a fair and reasonable price, and that it must be fairly exercised; and, if, in the colorable exercise of the power, a majority of the members, for a fraudulent purpose, combined to fix the price at a rate at which they knew it could not be made and sold without loss, their action would not bind the company, and in such a case, their good faith, it was held, might be inquired into.<sup>1</sup>

§ 313. **Legislative Officers are not personally liable for Adoption of Ordinances.** — Where the *officers of a municipal corporation* are invested with legislative powers, they are of course exempt from *individual liability* for the passage of any ordinance within their authority, and their motives in reference thereto will not be inquired into; nor are they individually liable for the passage of any ordinance not authorized by their powers; for such ordinance is void, and need not be obeyed.<sup>2</sup>

§ 314 (249). **Duration and Repeal of Ordinances.** — Since a valid by-law never becomes obsolete, it remains in force until *repealed* by the legislature or the corporation. The power to make includes the power to repeal without reference to the people of the municipality.<sup>3</sup> The *repeal cannot operate retrospectively* to impair private rights vested under it.<sup>4</sup> Therefore, the legislature, having authorized a

<sup>1</sup> *State v. Cincinnati Gas Company*, 18 Ohio St. 262 (1868), distinguished from *Fletcher v. Peck*, 6 Cranch, 87; *Bank v. United States*, 1 G. Greene (Iowa), 553. The courts will not inquire, even on the complaint of the State, into the motives which governed members of the legislature in the enactment of a law, or allow to be shown, for the purpose of defeating the operation of the law, that it was passed by fraud, corruption, and bribery of the members. *Wright v. Defrees*, 8 Ind. 298; followed, *McCulloch v. State*, 11 Ind. 424, 431 (1858); *s. p.* *Sunbury, &c. Railroad Co. v. Cooper*, 7 Am. Law Reg. 158 (1858); *Cooley Const. Lim.* 135, 136, 186, 208.

<sup>2</sup> *Jones v. Loving*, 55 Miss. 109; *Paine v. Boston*, 124 Mass. 486; *Freeport v. Marks*, 59 Pa. 257; *Baker v. State*, 27 Ind. 485; *Commissioners v. Duckett*, 20 Md. 468; *Weaver v. Devendorf*, 3 Denio (N. Y.), 117; *Pike v. Megoun*, 44 Mo. 491.

<sup>3</sup> *Kansas City v. White*, 69 Mo. 261; *The King v. Ashwell*, 12 East, 22; *The King v. Bird*, 13 East, 367; *Great Western*

*Railway Co. and North Cayuga, In re*, 23 Upper Can. C. P. 28; *Bloomer v. Stolley*, 5 McLean, 158; *Santo et al. v. State of Iowa*, 2 Iowa, 165; *Bank of Chenango v. Brown*, 26 N. Y. 467; *Rice v. Foster*, 4 Harring. (Del.) 479; *The People v. Collins*, 3 Mich. 347; *Welch v. Bowen*, 103 Ind. 252; *Greeley v. Jacksonville*, 17 Fla. 174. *In re Mollie Hall*, 10 Neb. 537, where an ordinance to suppress houses of prostitution, passed under the authority of the general incorporation law, was held *not to be repealed* by the adoption of a new incorporation law by the legislature, containing authority for cities to "restrain, prohibit, and suppress" such houses, and expressly repealing the old law.

A provision in an ordinance which is plainly repugnant to an ordinance previously adopted repeals the latter ordinance to the extent of the conflict between them. *Ex parte Wolf*, 14 Neb. 24; *Burlington v. Estlow*, 43 N. J. L. 13.

<sup>4</sup> *Rex v. Ashwell*, 12 East, 22; 3 Term R. 198; *The King v. Bird*, 13 East, 379; *Terre Haute v. Lake*, 43 Ind. 480 (1873); *State v. City Clerk, &c.*, 7 Ohio St. 355;

religious corporation to establish a cemetery within the limits of a city, on obtaining the consent of the city, and such consent having been given, the city authorities cannot, after their consent has been acted upon, repeal the resolutions giving it, and enjoin the religious corporation from the use of the cemetery, unless, indeed, it is shown to be an actual nuisance, detrimental to the health of the city, in which case its police and governmental powers might doubtless be exercised.<sup>1</sup>

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§ 315 (250). **Mode of conferring the Power; Construction of Grants of Authority.**—Municipal charters, or incorporating acts, are sometimes *silent as to the power to pass by-laws* or ordinances; and where this is the case, the municipal body has the power, incidental to all corporations, to enact appropriate by-laws.<sup>2</sup> Occasionally, the charter or incorporating act, without any specific enumeration of the purposes for which by-laws may be made, contains a general and comprehensive grant of power to pass all such as may seem necessary to the well-being and good order of the place. More frequently, however, the charter or incorporating act authorizes the enactment of by-laws in certain specified cases, and for certain purposes; and after this specific enumeration a general provision is added, that the corporation may make any other by-laws or regulations necessary to its welfare, good order, &c., not inconsistent with

*Stoddard v. Gilman*, 22 Vt. 568; *Pond v. Negus*, 3 Mass. 230; *ante*, chap. x.; *State v. Graves*, 19 Md. 351 (1862); *Bigelow v. Hillman*, 37 Me. 52; *Reiff v. Conner*, 5 Eng. (10 Ark.) 241; *Road, In re*, 17 Pa. St. 71, 75; *Nelson v. St. Martin's Parish*, 111 U. S. 716; *Louisiana v. Pillsbury*, 105 U. S. 278; *Cape May & S. L. R. R. Co. v. Cape May*, 35 N. J. Eq. 419; *People v. O'Brien*, 111 N. Y. 1 (1888); *Cunningham v. Almonte*, 21 Upper Can. C. P. 459; *Great Western R. Co., &c., In re*, 23 U. C. C. P. 28. An act changing an incorporated town into a city does not of itself repeal pre-existing ordinances. *Per Strong, J., Erie Academy Trus. v. Erie*, 31 Pa. St. 515 (1858); *ante*, sec. 85, note. Subsequent constitutional provision or legislative enactment, in conflict with existing by-laws, renders the latter void. *Mobile v. Dargan*, 45 Ala. 310 (1871).

<sup>1</sup> *New Orleans v. St. Louis Church*, 11 La. An. 244 (1856), distinguished from *Brick Presb. Church v. Mayor*, 5 Cow. (N. Y.) 538; *Musgrove v. Catholic*

*Church*, 10 La. An. 431; *ante*, sec. 97. The repeal of an ordinance *puts an end to a pending prosecution* under the repealed ordinance, unless there be a saving clause. The contrary rule as to State statutes held not to apply to by-laws or ordinances. *Naylor v. Galesburg*, 56 Ill. 285 (1870); *Kansas City v. Clark*, 68 Mo. 588; *Barton v. Gadsden*, 79 Ala. 495, which also holds that an ordinance prohibiting the sale of liquor under a penalty is repealed by an ordinance prohibiting such sale without a license, because of inconsistency and repugnancy. The fact that an ordinance directing a certain street improvement to be made was repealed, *held*, to be conclusive in favor of a perpetual injunction, restraining the contractor or the city from proceeding. *Kaime v. Harty*, 4 Mo. App. 357.

<sup>2</sup> *A Coal-Float v. Jeffersonville*, 112 Ind. 15, citing the text. *Supra*, sec. 308, note. *Chamberlain v. Evansville*, 77 Ind. 542.



the Constitution or laws of the State. This difference is essential to be observed, for the power which the corporation would possess under what may, for convenience, be termed "the general welfare clause," *if it stood alone*, may be limited, qualified, or, when such intent is manifest, impliedly taken away by provisions specifying the particular purposes for which by-laws may be made. It is clear that the general clause can confer no authority to abrogate the limitations contained in special provisions.

§ 316. **Special and general Grants of Authority.**—When there are *both special and general provisions*, the power to pass by-laws under the special or express grant can only be exercised in the cases and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject-matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority, and not repugnant to the Constitution and general laws of the State.<sup>1</sup>

<sup>1</sup> State v. Ferguson, 33 N. H. 424 (1856), where this subject is ably treated in a judgment delivered by Mr. Justice Foster, holding a by-law of the city of Concord, in relation to the sale of intoxicating liquor, invalid, as contravening the special provisions of the charter, and therefore not sustainable under the general welfare clause of the charter.

"The power to make by-laws, when not expressly given, is *implied* as an incident to the very existence of a corporation; but in the case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication." *Per Sawyer, J., arguendo*, in State v. Ferguson, 33 N. H. 424, 430 (1856); citing 2 Kyd on Corp. 102; Angell & Ames on Corp. 177; and Child v. Hudson's Bay Co., 2 P. Wms. 207. The true rule in such cases may, perhaps, be correctly expressed to be, that the enumeration of special cases does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions. Heisembrittle v. Charleston, 2 McMullan (S. C.), 233;

Wadleigh v. Gilman, 3 Fairf. (12 Me.) 403; State v. Clark, 8 Post. (28 N. H.) 176, and comments in 33 N. H. 432; State v. Freeman, 38 N. H. 426; Commonwealth v. Turner, 1 Cush. (Mass.) 493; Collins v. Hatch, 18 Ohio, 523; see New Orleans v. Philippi (taxation), 9 La. An. 44; Indianapolis v. Indianapolis Gas Co., 66 Ind. 396, citing text; Laundry License Case, 22 Fed. R. 701; Clark v. South Bend, 85 Ind. 276. Huesing v. Rock Island, Supreme Court, Ill. MSS. 1889, applying text. *Post*, sec. 432 *et seq.*, and cases.

In Georgia, the Superior Courts adopt the following as the true rule for ascertaining the extent of the power of a city to pass ordinances. "The city council is restrained to such matters, whether specially enumerated or included under general grant, as are indifferent in themselves, such matters as are free from constitutional objection and have not been the subject of general legislation; or, as it is expressed in the charter, are not repugnant to the constitution or laws of the land." Dubois v. Augusta (health ordinance), Dudley (Ga.) Rep. 30 (1831); Williams v. Augusta (powder ordinance), 4 Ga. 509, 514 (1848). Power to pass

And it has been very properly held that a special grant of power to a municipal corporation to adopt ordinances on enumerated subjects connected with municipal concerns is in addition to the incidental power of the corporation.<sup>1</sup>

§ 317 (251). **Ordinances cannot enlarge or change the Charter or Statute.**—Since all the powers of a corporation are derived from the law and its charter, it is evident that *no ordinance or by-law of a corporation can enlarge, diminish,\* or vary its powers.*<sup>2</sup> A similar

necessary by-laws is incidental, but this power is limited not only by the terms, but the spirit and design, of the charter, and the general principles and policy of the common law. *Taylor v. Griswold*, 2 J. S. Green (N. J.), 222; *Mount Pleasant v. Breeze*, 11 Iowa, 399 (1860), *per Wright, J.*

A power to pass ordinances to "improve the morals and order" of the people does not authorize an ordinance to "punish" the offence of keeping houses of ill-fame. Whether the legislature can constitutionally confer power upon cities to punish acts made crimes by the laws of the State, *not decided*. *Chariton v. Barber*, 54 Iowa, 360 (1880), *Beck, J.*; s. c. 11 Cent. Law J. 358; 37 Am. Rep. 209. More fully, *post*, sec. 432 *et seq.*

<sup>1</sup> *State v. Morristown*, 33 N. J. L. 57 (1868). *Depue, J.* in his opinion, distinguishes such a case from *Norris v. Staps*, *Hobart*, 210, where the corporation was created by the crown, and where it was held that a special clause in the letters-patent authorizing the corporate body (a fellowship of weavers) to make by-laws, did not add to implied powers, and that its by-laws were subject to the general law of the realm and subordinate to it. "But," he adds, "a special grant of power to a municipal corporation is an entirely different thing; it is a delegation of authority to legislate by ordinance on the enumerated subjects, and does add to the powers incident to the creation of the corporation. The numerous instances, in our own State, of the grant of such powers in relation to the opening and improvement of streets, the making of sewers, and the assessment of taxes, afford illustrations of this distinction." *Ib.* 62.

<sup>2</sup> *Thompson v. Carroll*, 22 How. 422 (1859); *Andrews v. Insurance Co.*, 37 Me. 256 (1854); *Thomas v. Richmond*, 12 Wall. 349 (1871); *Garden City v. Abbott*, 34 Kan. 283, (license tax upon non-resident attorneys, imposed by ordinance under a law authorizing such a tax upon residents only held unlawful); *Commonwealth v. Roy*, 140 Mass. 432; *State v. Municipal Court of St. Paul*, 32 Minn. 329; *State, ex rel. v. Nashville*, 15 Lea, 697 (power to change a salary confers no power to abolish it). "A power vested by legislation in a city corporation, to make by-laws for its own government and the regulation of its own police, cannot be construed as imparting to it the power to repeal the [general] laws in force, or to supersede their operation by any of its ordinances. Such a power, if not expressly conferred, cannot arise by mere implication, unless the exercise of the power given be inconsistent with the previous law, and does necessarily operate as its repeal *pro tanto*. Nor can the presumption be indulged, that the legislature intended that an ordinance passed by the city should be superior to, or take the place of, the general law of the State upon the same subject." *Simpson, C. J.*, *March v. Commonwealth*, 12 B. Mon. (Ky.) 25, 29 (1851); *Rothschild v. Darien*, 69 Ga. 503; *Breninger v. Belvidere*, 44 N. J. L. 350. "Huckster" means a petty dealer or retailer of small articles of provisions, &c., and an ordinance cannot enlarge the ordinary meaning so as to embrace "any person not a farmer or butcher who should sell, or offer for sale, any commodity not of his own manufacture," and subject such person to a penalty; it not being, says *Ranney, J.*, "part of the franchise of municipal corporations to change the mean-

rule obtains in England, where it is held that neither the king's charter nor any by-law can introduce an alteration in rules which have been prescribed to a corporation by an act of parliament.<sup>1</sup> By-laws are in their nature strictly local, and subordinate to the general laws.

§ 318 (252). **Ordinance need not recite Authority to pass it.**—*It is not essential to the validity* of an ordinance executing powers conferred by the legislature that it should state the power in execution of which the ordinance is passed. If it state no particular power as its basis, it will be judicially regarded as emanating from that power which would have warranted its passage. If two such powers exist, it may be imputed to either, in conformity to which its provisions and prerequisites show that it has been adopted. If, in these respects it is in accordance with both, no injustice can result in regarding it as the offspring of both or either of the powers.<sup>2</sup>

§ 319 (253). **Must be Reasonable and Lawful.**—In England, the subjects upon which by-laws may be made were not usually specified in the king's charter, and it became an established doctrine of the courts that every corporation had the implied or incidental right to pass by-laws; but this power was accompanied with these limitations, namely, that *every by-law must be reasonable*, and not inconsistent with the charter of the corporation, nor with any statute

ing of English words." *Mays v. Cincinnati*, 1 Ohio St. 268, 272 (1853). "Butcher" defined. *Henback v. State*, 53 Ala. 523 (1875); s. c. 25 Am. Rep. 650; 18 Alb. Law Jour. 364.

<sup>1</sup> *Rex v. Miller*, 6 Term R. 277; *Rex v. Barber Surgeons*, 1 Ld. Raym. 585. It has even been said that the general assembly cannot authorize a municipal corporation to repeal, by ordinance, a statute of the State. *Haywood v. Mayor, &c.*, 12 Ga. 404, *per Lumpkin, J.* But it may provide that on the passage of an ordinance of a certain character, the State law on the subject shall not be in force in the corporate limits. *State v. Binder*, 38 Mo. 450; *post*, chap. xxiii.

<sup>2</sup> *Per Dorsey, C. J.*, *Methodist P. Church v. Baltimore*, 6 Gill (Md.), 391 (1848). Under power to pass an ordinance if found *necessary*, the *necessity* for its enactment, being implied from its mere passage, need not be recited in the ordi-

nance, nor averred in proceedings to enforce it. *Stuyvesant v. Mayor, &c. of New York*, 7 Cow. (N. Y.) 588; s. p. *Young v. St. Louis*, 47 Mo. 492 (1871). This case reaffirmed in *Kiley v. Forsee*, 57 Mo. 390 (1874); *Platter v. Elkhart County*, 103 Ind. 360. But the charter may be *imperative* in requiring the necessity to be expressed by ordinance or resolution; so held in *Hoyt v. East Saginaw*, 19 Mich. 39 (1869). So, in England it is not necessary that the preamble to a by-law should state the reasons for making it. *Rex v. Harrison*, 3 Burr. 1328. See, also, *Grierson v. Ontario*, 9 Upper Can. Q. B. 623; *Fisher v. Vaughan*, 10 Upper Can. Q. B. 492. If a municipal corporation attempt to act according to a statute not in force, this does not invalidate their proceedings, if the same are in accordance with existing statutes. *State v. Jersey City*, 3 Dutch. (N. J.) 493.

of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property.<sup>1</sup> In this country the courts have often affirmed the general incidental power of municipal corporations to make ordinances, but have always declared that ordinances passed in virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State.<sup>2</sup>

<sup>1</sup> *Sutton's Hospital Case*, 10 Rep. 31 a; *Feltmakers v. Davis*, 1 Bos. & P. 98, 100; *Norris v. Staps*, Hob. 211; *Rex v. Maidstone*, 3 Burr. 1837; *Com. Dig. Franch. F. 10*; *London v. Vanacre*, 1 Ld. Raym. 496; 2 Kyd, chap. iv. sec. 10, p. 95, and cases cited; *Bac. Abr. tit. By-law*.

<sup>2</sup> An ordinance which is *within express powers granted* cannot be held to be unreasonable and void. *Haynes v. Cape May*, 50 N. J. L. 55 (1887). In such case the court can only construe the extent of the grant, and has nothing to do with the reasonableness of an ordinance carrying it into effect. *District of Columbia v. Waggaman*, 4 Mackey, 328. *Must be reasonable*. *Kip v. Paterson*, 2 Dutch. (N. J.) 298; *Dayton v. Quigley* (citing text), 29 N. J. Eq. 77 (1878); *Comm'rs v. Gas Co.*, 12 Pa. St. 318 (1859); *Fisher v. Harrisburg*, 2 Grant (Pa.) Cases, 291 (1854); *Commonwealth v. Robertson*, 5 Cush. (Mass.) 438 (1850); *Waters v. Leech*, 3 Ark. 110; *Mayor v. Winfield*, 8 Humph. (Tenn.) 707 (1848); *Davis v. Anita*, 73 Iowa, 325 (1887). Text approved. *Frank, In re*, 52 Cal. 606. *Commonwealth v. Steffee*, 7 Bush (Ky.), 161 (1870); *People v. Throop*, 12 Wend. (N. Y.) 183, 186 (1834); *Mayor v. Beasley*, 1 Humph. (Tenn.) 232 (1839); *State v. Freeman*, 38 N. H. 426 (1859); *White v. Mayor, &c.*, 2 Swan (Tenn.), 364 (1852); *Pedrick v. Bailey*, 12 Gray (Mass.), 161; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Clason v. Milwaukee*, 30 Wis. 316 (1872); *Tugman v. Chicago*, 78 Ill. 405 (1875); *Ex parte Chin Yan*, 60 Cal. 78; *Gilham v. Wells*, 64 Ga. 192; *Meyers v. Chicago*, R. I., & P. R. Co., 57 Iowa, 555, approving text; *Cape Girardeau v. Riley*, 72 Mo. 220; *Kneedler v. Norristown*, 100 Pa. St. 368; *O'Maley v. Freeport*, 96 Pa. St. 24; *Kirkham v. Russell*, 76 Va. 956; *Atkin-*

*son v. Goodrich Transportation Co.*, 60 Wis. 141 (ordinance requiring *spark arrester* on steam-boats). An ordinance requiring *druggists to furnish quarterly verified statements* of the kind and quantity of intoxicating liquors sold, to whom, &c., was held unreasonable and oppressive. *Clinton (city of) v. Phillips*, 58 Ill. 102; s. c. 11 Am. Rep. 52. An ordinance forbidding the placing or carrying of *sign-boards on side-walks* is reasonable and valid. *Commonwealth v. McCafferty*, 145 Mass. 384. An ordinance *exacting a license from peddlers* of "not less than one nor more than twenty-five dollars for a fixed time, in the discretion of the mayor," held unreasonable. *State Center v. Barenstein*, 66 Iowa, 249. An ordinance requiring *cotton merchants to keep a record* of the name of the seller of loose cotton, and the quantity of each purchase, also held to be against the principles of personal liberty and common right. *Long v. Taxing District*, 7 Lea, 134. An ordinance *forbidding preaching, lecturing, &c., on a public common*, held reasonable. *Commonwealth v. Davis*, 140 Mass. 485; *Mankato v. Fowler*, 32 Minn. 364 (license fee of \$300 upon auctioneers unreasonable). An ordinance absolutely prohibiting (not regulating) street processions with musical instruments, banners, torches, &c., or while singing or shouting, without the consent first obtained of the mayor, under a penalty of a fine not exceeding \$500, and costs, and in default of payment, imprisonment not exceeding ninety days, was held, in the absence of any express legislative authority therefor, to be unreasonable and void, and for this reason a member of the Salvation Army, convicted thereunder, was discharged on *habeas corpus*. *Re Frazee*, 63 Mich. 396 (1886); s. c. 30 N. W. Rep. 72; 35 Alb. Law J., 6. The opinion of

§ 320 (254). **Same subject.**—The principle of law, that ordinances passed under the general authority to enact all such as will be

*Campbell*, C. J., states the grounds of this conclusion with great, and *almost* convincing, force. See *People v. Rochester*, 51 N. Y. Sup. Ct. (44 Hun) 166 (Salvation Army walking through streets with banners). "An ordinance, general in its scope, may be adjudged reasonable as applied to *one state of facts*, and unreasonable when applied to circumstances of a different character." *Knapp*, J., in *Nicoulin v. Lowery*, 49 N. J. Law, 391; *Pennsylvania R. R. Co. v. Jersey City*, 47 N. J. Law, 286.

The trustees of public schools had statutory authority to direct what branches should be taught, and to adopt and enforce all necessary *rules and regulations for the management and government of schools*. A candidate for admission passed a satisfactory examination in everything but grammar, and was refused admission on that account. *Held*, a rule or regulation denying him admission on that account was unreasonable, and that *mandamus* would lie to compel his admission to study the other branches. *Trustees v. People*, &c., 87 Ill. 303; s. p. *Rulison v. Post*, 79 Ill. 567.

Ordinance may be shown to be unreasonable, as that one for building a sidewalk was unnecessary and oppressive, it being located in an uninhabited portion of the city and disconnected with any other street or sidewalk. *Corrigan v. Gage*, 68 Mo. 541.

*Must not conflict with the charter or statute, or be repugnant to fundamental rights.* *Dubois v. Augusta* (health ordinance), *Dudley* (Ga.) Rep. 30 (1833); *Williams v. Augusta* (powder ordinances), 4 Ga. 509 (1848); *Adams v. Mayor*, &c. (liquor statute), 29 Ga. 56; *Taylor v. Griswold*, 2 Green (N. J.), 222 (1834); *New Orleans v. Philippi* (taxation), 9 La. An. 44; *Perdue v. Ellis* (liquor traffic), 18 Ga. 586; *Haywood v. Mayor*, 12 Ga. 404; *Paris v. Graham* (tax on dram-shops), 33 Mo. 94; *St. Louis v. Cafferata*, 24 Mo. 94; *St. Louis v. Bentz*, 11 Mo. 61; *Carr v. St. Louis* (fee of officers), 9 Mo. 191 (1845); *Marietta v. Fearing* (estrays animals), 4 Ohio, 427 (1831); *Collins v. Hatch* (ani-

mals at large), 18 Ohio, 523 (1849); *Mayor, &c. of New York v. Nichols* (inspection laws), 4 Hill (N. Y.), 209 (1843); *Commonwealth v. Turner* (liquor traffic), 1 Cush. (Mass.) 493 (1848); *Philips v. Wickham*, 1 Paige (N. Y.) Ch. 590; *Howard v. Savannah*, T. Charlt. R. 173; *Smith v. Knoxville*, 3 Head (Tenn.), 245 (1859); *Cowen v. West Troy*, 43 Barb. (N. Y.) 48 (1864); *Pesterfield v. Vickers*, 3 Coldw. (Tenn.) 205; *City Council v. Benjamin*, 2 Strob. (S. C.) 508; *City Council v. Ahrens*, 4 Strob. (S. C.) 241; *Heisembrittle v. Charleston Council*, 2 McM. (S. C.) 233; *City Council v. Goldsmith*, 2 Speers (S. C.), 435; *State v. Welch*, 36 Conn. 215; *Newton v. Belger*, 143 Mass. 598; *White v. Bayonne*, 49 N. J. L. 311; *Lozier v. Newark*, 48 N. J. L. (19 Vroom) 452; *Volk v. Newark*, 47 N. J. L. (18 Vroom) 117; *Ex parte Kearny*, 55 Cal. 212; *Cape Girardeau v. Riley*, 72 Mo. 220; *State v. Brittain*, 89 N. C. 574. An ordinance authorizing the tax-collector and police to *put the purchaser* of land at a sale for taxes *in possession thereof*, held void for violating the constitutional provision declaring that no person shall be deprived of property without "due process of law." *Calhoun v. Fletcher*, 63 Ala. 574. An ordinance imposing a *license tax* upon the owners of towboats running between New Orleans and the Gulf of Mexico held to be a regulation of commerce between the States, and void under art. 1, sec. 8, par. 3, of the U. S. Constitution. *Moran v. New Orleans*, 112 U. S. 69. An ordinance which gave to the municipal authorities arbitrary power to give or withhold consent for carrying on the *laundry business*, without regard to legal discretion or to the competency of persons applying therefor, and the administration of which caused unjust discriminations founded on differences of race, declared to be in violation of the Fourteenth Amendment to the U. S. Constitution. *Yick Wo v. Hopkins*, 118 U. S. 356, reversing *Matter of Yick Wo*, 68 Cal. 294. See also *In re Tie Loy*, 26 Fed. Rep. 611. But a municipal ordinance prohibiting washing and ironing in public laundries, in speci-

necessary, *must be reasonable*, or they will be void, is well illustrated by a case in Pennsylvania.<sup>1</sup> A municipal corporation passed two ordinances *in relation to a gas company*,—a private corporation, with a special charter authorizing the construction and maintenance of suitable gas-works within the limits of the municipal corporation, and the use of the streets for the laying down of pipes. The first ordinance prohibited the gas company from opening paved streets from December to March in each year, for the purpose of laying gas mains. This ordinance the court considered to be reasonable, in view of the difficulty of repairing the paved streets during the winter months. And the other ordinance prohibited the gas company from opening a paved street at any time, for the purpose of laying pipes from the main to the opposite side of the street. The court say: "The effect of this ordinance is to compel the company to construct two mains, one on each side of the street instead of one ;

fied territorial limits, from ten at night till six in the morning, and operating upon all engaged in the same business under like conditions, sustained as a legitimate police regulation, within the competency of a municipality possessed of the ordinary powers, and is not in conflict with the Fourteenth Amendment of the Constitution of the United States, since this Amendment does not impair the police power of the State. *Barbier v. Connolly*, 113 U. S. 27 (1884); *Soon Hing v. Crowley*, 16. 703. Index title, "Police Power"; *infra*, secs. 324, 325, 357, and note. When a *legislature has no power*, under the Constitution, to authorize a municipal corporation to pass an ordinance (as here, to permit a railway to construct its road upon certain streets) *it cannot, by a special act*, legalize such an ordinance adopted by a city without authority. *Strange v. Dubuque*, 62 Iowa, 303. And see *Independent School Dist. of Burlington v. Burlington*, 60 Iowa, 500. A power to *construct sewers* when, in the judgment of the council, "the public good required," held not to confer power to grant the use of a public street to an *individual* for a private sewer. *Hutchinson v. Trenton Board of Health*, 39 N. J. Eq. (12 Stew.) 569.

An ordinance *prohibiting any auctioneer to make any sale* "except to the highest bidder" was held void for want of legislative or charter authority to enact it. *Mar-*

*tin, In re*, 27 Ark. 467 (1872). An ordinance prohibiting heavy *awnings* over sidewalks, without consent of municipal authorities, is reasonable and valid. *Pedrick v. Bailey*, 12 Gray (Mass.), 161. Under the general welfare clause an ordinance forbidding *sale of lemonade, cake, &c.*, at a temporary stand without paying a license tax is unauthorized and unreasonable. *Barling v. West*, 29 Wis. 307; s. c. 9 Am. Rep. 576; *post*, sec. 387.

An ordinance conferring upon one person the right to *remove and convert to his own use dead animals*, to the exclusion of their owners' rights, held unconstitutional as being a taking of private property for public use without compensation, and as depriving a person of his property without due process of law. *River Rendering Co. v. Behr*, 77 Mo. 91. Where power was conferred upon a town "to prevent the introduction of infectious or contagious diseases, and to preserve the health of the inhabitants," an ordinance forbidding any person "to import, sell, or otherwise deal in *second-hand or cast-off garments*," &c., with a proviso excepting the sale of such articles when not imported or when they had not been used by persons having infectious diseases, was held not included in the power conferred, and unlawful *as being in restraint of lawful trade*. *Greensboro v. Ehrenreich*, 80 Ala. 579.

<sup>1</sup> *Commissioners of North Liberties v. Gas Co.*, 12 Pa. St. 318 (1849).

thereby materially increasing the expense to the company, and consequently enhancing the price of gas to the inhabitants of the district." And this ordinance was declared to be void. So, where *the city owns water-works*, its by-laws in respect to the supply of water to the citizens must be reasonable; and a supply cannot be refused on the application of the *owner*, because the tenant was in arrears for water supplied to him while he occupied another house owned by another landlord.<sup>1</sup>

§ 321 (255). **Must not be Oppressive.**—Courts will declare *ordinances to be void that are oppressive* in their character. Thus, the Supreme Court of Tennessee, in a judgment which reflects credit upon the tribunal that pronounced it, declared void an ordinance of the city of Memphis which ordered the arrest, imprisonment, and fine of all free negroes who might be found out after ten o'clock at night, within the limits of the corporation.<sup>2</sup> So, an ordinance forbidding, under penalty, the "knowingly associating with persons having the reputation of being thieves and prostitutes," can only be sustained, by construing it to require proof of complicity, actual or intended, with the persons named in the complaint as the reputed thieves and prostitutes; otherwise it would be void, as an invasion of the right of personal liberty.<sup>3</sup> So, where the common council of

<sup>1</sup> Dayton v. Quigley, 29 N. J. Eq. (2 Stew.) 77 (1878); see cases cited in reporter's note at end of the opinion. The Chancellor in substance says: "The water-works belong to the municipality, and are for the benefit of the inhabitants of the city. The inhabitants are entitled to the use of the water on compliance with reasonable regulations. The use of the water for the complainant's tenants is necessary to the full enjoyment by him of his property. To refuse to furnish water to his tenant there unless the complainant pays a debt due from the tenant to the city for water furnished to him elsewhere, on premises not belonging to the complainant, would, obviously, be to compel him to pay the tenant's debt as a condition precedent to obtaining the water for his premises while occupied by the tenant. The regulations must be reasonable. 1 Dill. on Mun. Corp. secs. 319, 320. The refusal to furnish water to complainant is, under the circumstances, unjustifiable, and is an injury for which he is entitled to relief in this court. High on Inj. sec. 787."

<sup>2</sup> Mayor v. Winfield, 8 Humph. (Tenn.) 707 (1848). The oppressiveness and inequality, alleged to invalidate a by-law, must be made apparent to the court. Mayor v. Beasley, 1 Humph. (Tenn.) 232 (1839); St. Louis v. Weber, 44 Mo. 547 (1869). A by-law prohibiting *swine running at large* in a city is presumptively reasonable as a sanitary or police regulation. Commonwealth v. Patch, 97 Mass. 221; Commonwealth v. Bean, 14 Gray (Mass.), 52.

Ordinances to regulate callings and trades must not be unreasonable, partial, in restraint of trade, or in contravention of public policy. Frank, *In re*, 52 Cal. 606 (1877). Thus a statute forbidding the reservation of seats at public exhibitions, upon the sale of tickets of admission, after the opening of the doors, is an unconstitutional interference with private property. Dist. of Columbia v. Saville, 1 McArthur, 581.

<sup>3</sup> St. Louis v. Fitz, 53 Missouri, 582 (1878).

Baltimore, by ordinance, forbade any person *to erect or maintain any steam-engine or boiler* without authority from the mayor, and authorized the mayor, upon six months' notice, to revoke any permit to use or maintain a steam-engine or boiler, and that thereupon the same should be removed, under a heavy penalty for failure to remove it, in an action to restrain the prosecution of a suit for the penalty by one maintaining a steam-engine after notice to remove the same by the mayor, it was held that, by itself, a stationary steam-engine is not a nuisance; and that an ordinance which commits to the unrestrained will of a single public officer a power practically absolute over the use of steam within a city, so that he might prohibit its use altogether, the exercise of which may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences, and motives easy of concealment and difficult to be detected and exposed, does not fall within the domain of law, and is void and inoperative.<sup>1</sup>

§ 322 (256). **Must be Impartial, Fair, and General.** — As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. *Special and unwarranted discrimination*, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation.<sup>2</sup>

<sup>1</sup> *Baltimore v. Radecke*, 49 Md. 217; s. c. 21 Alb. Law Jour. 117.

<sup>2</sup> *Russ v. Mayor, &c. of New York*, 12 N. Y. Leg. Obs. 38; *White v. Mayor*, 2 Swan (Tenn.), 364 (1852); *De Ben v. Gerard*, 4 La. An. 30; *Chicago v. Rumpff*, 45 Ill. 90; *Hudson v. Thorne*, 7 Paige, 261; *Baton Rouge Council v. Crémonini*, 36 La. An. 247; *Ex parte Chin Yan*, 60 Cal. 78; *Zanone v. Mound City*, 103 Ill. 552; *Citizens' Gas & M. Co. v. Elwood*, 114 Ind. 332 (1887). The doctrine of the text approved and applied. *Tugman v. Chicago*, 78 Ill. 405 (1875). An ordinance *prohibiting a particular railroad corporation by name* from running locomotives by steam on a specified street is valid, and does not contravene the principle stated in the text. *Richmond, &c. Railroad Co. v. Richmond*, 96 U. S. 521

(1877); s. c. 10 Chicago Legal News, 379. So an ordinance compelling a railroad company *to station flagmen* wherever the railroad may cross streets, &c., is a valid exercise of legislative power, as a police regulation for the safety of the public and passengers on the trains. Such ordinance when passed is a judicial act, imposing pecuniary burden and loss on the railroad company, and is subject to review by courts, which will determine whether the power conferred was exercised in a legal and reasonable manner. *State v. East Orange*, 41 N. J. L. 127. So, also, a resolution of a water board, under authority of a city charter, requiring certain consumers *to put in expensive meters*, without their consent, under the penalty of cutting off the water for non-payment of the price of the meters, was declared void as being an unwarranted



§ 323 (257). **May regulate, but not restrain Trade.**—In England, certain customs prevail in prescriptive corporations restrictive of freedom of trade and against common right. Such customs, from long usage and unknown origin, are regarded in the light of regulations prescribed by a charter which is supposed to have existed, but is lost. Such customs, while not favored by the English courts, are yet held legal, but must be incontrovertibly established. But by the Municipal Corporations Act of 1835 (5 & 6 Wm. IV. chap. lxxvi. sec. 14),<sup>1</sup> exclusive rights of trading have been abolished, and

discrimination. *Red Star Steamship Co. v. Jersey City*, 45 N. J. L. (16 Vroom) 246, citing the text.

Ordinances should be general, or, at all events not discriminating in their operation. They may, it is said, impose fines on persons violating their provisions within the corporation or within a designated district therein, or in a certain street; but an ordinance naming one individual and directing him to do certain acts with respect to a building alleged to be a nuisance, and in default of compliance, imposing a fine of a specific amount upon him, was held to be unreasonable, contrary to common right, and void. *Municipality v. Blineau*, 3 La. An. 688 (1848). Compare *Bozant v. Campbell*, 9 Rob. (La.) 411 (1845), where, without repealing an ordinance prohibiting private hospitals, the grant of permission to one or more individuals to erect such hospitals was sustained. And see, also, *Commonwealth v. Goodrich*, 13 Allen (Mass.), 545, where a municipal regulation, limited in its character, was considered valid. Such cases depend upon their special circumstances. The test is that the regulation must be reasonable as applied to the subject-matter.

If an ordinance is general in its application, the mere fact that it peculiarly affects a particular person raises no presumption that it was enacted for the purpose of annoying him or depriving him of his rights. *Shinkle v. Covington*, 83 Ky. 420. Ordinances may be adapted to the varying municipal necessities and exigencies. *Covington v. East St. Louis*, 78 Ill. 548 (1875); *post*, sec. 394. In exercising its power to require adjacent lot-owners to make local improvements, the corporation, it has been held in *Tennessee*, must not

act in a partial and oppressive manner; therefore it cannot select particular individuals by name, and require them to construct pavements or local improvements in front of their lots, and omit others in the same improvement district, if this be done without good cause or reason for the distinction. *White v. Nashville*, 2 Swan (Tenn.), 364 (1852); *post*, sec. 799.

<sup>1</sup> *Ante*, chap. iii. sec. 35, and note. *Post*, sec. 362, note and cases as to monopolies and ordinances in restraint of trade. *Criminal conspiracies* in restraint of trade and the various English statutes in respect thereof are instructively presented by Mr. Justice Stephen, 3 Hist. Criminal Law, chap. xxx. The fact that certain persons were engaged in a particular kind of business in a given locality, at the time of the adoption of an ordinance, would not authorize the municipal corporation, by such ordinance, to permit such persons to continue their business, whilst it prohibited others from engaging in the same business in the same locality. *Tugman v. Chicago*, 78 Ill. 405 (1875).

A statute authorizing municipal authorities to license and regulate such callings, trades, and employments as the public good may require, will empower them to exact a license for revenue purposes, if that construction is not inconsistent with the whole charter and the general legislation of the state. An ordinance fixing one rate of license for selling goods which are within or in transit to the city, and another rate for goods not within or in transit to the city, is invalid. *Frank, In re*, 52 Cal. 606; *s. p. Mayor v. Althrop*, 5 Coldw. 554; *Cronin v. People*, 82 N. Y. 318 (an ordinance regulating the slaughter of animals held valid). *Supra*, sec. 319, note.

it is enacted "that, notwithstanding such custom or by-law [to the contrary], every person in any borough may keep any shop for the sale of all lawful wares and merchandise, by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft, for hire, gain, sale, or otherwise, within any borough."

§ 324 (258). **Customs in Restraint of Trade.**—In *this country* corporations derive all their powers from legislative acts of comparatively modern date, and *prescriptive customs in restraint of trade or against common right are unknown*. No inconsiderable portion of the cases in the old books in England relate to these customs, their validity and mode of proof, but they are in the main inapplicable to the present period and to the institutions in this country, where freedom in the choice and pursuit of all occupations never has been denied. The inapplicability of the English decisions is noticed by Mr. Justice Dewey, in delivering the opinion of the Supreme Court of Massachusetts in an important case involving the validity of an ordinance of the city of Boston regulating the use of hackney coaches and other vehicles within the city. He observes that "in the arguments addressed to the court, the question was somewhat discussed as to the power incident to municipal corporations to create by-laws of the character here adopted; and a reference was made to various cases in the English courts, where questions of this nature had arisen. Upon examination of those cases they will be found less important and less satisfactory as guides here, inasmuch as it is quite obvious that in many of them, and particularly those where the ordinance seemed most questionable as not being within the ordinary exercise of municipal authority, the by-laws were sustained upon the ground of ancient and long-continued usage, ripening into a prescriptive right on the part of the municipal corporation." But "no such ground," he adds, "can be urged here; and the present ordinance, if sustained at all, must be shown to be authorized by the express provision of the charter, or be derived as an incidental power resulting from its incorporation as a city, or be found in some general or special statute."<sup>1</sup>

<sup>1</sup> *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 568 (1848). See as to English decisions, remarks of *Rhodes, J.*, in *Herzo v. San Francisco*, 33 Cal. 134, 145 (1867). *Post*, sec. 362, note. In the case first cited the court decided that the business of *carrying persons for hire* from town to town in stage-coaches and omnibuses is not so far a territorial or local occupation

as will authorize one city, unless it has express and direct authority so to do from the legislature, to pass an ordinance requiring the inhabitants of other towns to obtain from it a license before exercising that employment in carrying persons to or from it. Such an ordinance was considered to be an unnecessary restraint upon business, and is not binding upon citizens

§ 325 (259). **Must not contravene Common Right.** — An ordinance cannot legally be made *which contravenes a common right*, unless the power to do so be plainly conferred by a valid and competent legislative grant; and in cases relating to such a right, authority to regulate, conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit.<sup>1</sup> Thus, in Connecticut, it is held that every one has, presumptively, a *common-law right to fish* in navigable rivers, and that, though every town may, by statute, have the power to make by-laws to *regulate* fisheries of clams and oysters within its limits, yet this power does not authorize a by-law *prohibiting all persons* except its own inhabitants from taking shell-fish in a navigable river, within the limits of such town; such a by-law, being in contravention of a common right, is void.<sup>2</sup>

§ 326 (260). **Same subject.** — But there is, however, *no common right* to do that which, by a valid law or ordinance, is prohibited; and hence courts will not declare an authorized ordinance void because it prohibits what otherwise might lawfully be done. In discussing the subject, Mr. Justice Evans illustrates it in this wise: "If there was no law interfering, the butcher might kill his beeves and hogs in the street. If the butcher could do it, any man might, and it might, therefore, be said to be a common right; but when the law prohibited it, it was no longer a common right. A legal restraint may be imposed on a few for the benefit of the many."<sup>3</sup> Therefore, while ordinances which unnecessarily restrain

of other places. The court does not question the right of the city, by reasonable by-laws, to require *inhabitants*, whose business is local and carried on within the city, to obtain a license before exercising certain employments. *Per Dewey, J., Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 575; see also *Napman v. People*, 19 Mich. 352 (1869); *Barling v. West*, 29 Wis. 307; s. c. 9 Am. Rep. 576 (1871); *Hayes v. Appleton*, 24 Wis. 542; *Taylor v. Pine Bluff*, 34 Ark. 603 (excessive charge for weighing cotton); *post*, sec. 369.

Whenever a by-law seeks to *alter a well-settled and fundamental principle of the common law*, or to establish a rule interfering with the rights of individuals or the public, the power to do so must come from plain and direct legislative enactment.

*Taylor v. Griswold*, 2 Green (N. J.), 222 (1834); *ante*, sec. 89, and note.

<sup>1</sup> *Taylor v. Griswold*, 2 Green (N. J.), 222 (1834); *State v. Mott*, 61 Md. 297; *Milliken v. Weatherford*, 54 Tex. 388, where an ordinance *prohibiting the renting of private property* to lewd women was declared void.

<sup>2</sup> *Hayden v. Noyes*, 5 Conn. 391 (1824); *Peck v. Lockwood*, 5 Day (Conn.), 22; *Willard v. Killingworth*, 8 Conn. 247; *Clason v. Milwaukee*, 30 Wis. 316. The general welfare clause does not authorize the imposition of a license tax for engaging in a lawful business, — sale of lemonade, cake, &c., at temporary stands on sidewalk. *Barling v. West*, 29 Wis. 307 (1871); s. c. 9 Am. Rep. 576; see *post*, sec. 387; *ante*, sec. 89.

<sup>3</sup> *Per Evans, J.*, in *City Council v.*

trade or operate oppressively upon individuals will not be sustained, yet such as are reasonably calculated to preserve the public health are valid although they may abridge individual liberty and individual rights in respect of property.<sup>1</sup> Accordingly, in a populous city an ordinance is valid as a sanitary regulation which *prohibits the purchasing of carcasses of animals* for boiling, steaming, or rendering the same, and the rendering and steaming of the same, within the city, except in certain enumerated cases and under specified conditions of a reasonable character.<sup>2</sup>

§ 327 (261). **Validity is for the Court, and not the Jury, to determine.**—Whether an ordinance be reasonable and consistent with the law or not is a *question for the court*, and not the jury, and evidence to the latter on this subject is inadmissible. But in determining this question the court will have to regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country.<sup>3</sup>

Ahrens, 4 Strob. (S. C.) Law, 241, 257 (1850); City Council v. Baptist Church, 1b. 306, 310; Peoria v. Calhoun, 29 Ill. 317, (1862); St. Paul v. Colter, 12 Minn. 41, (1866).

<sup>1</sup> Text approved, State v. Holcomb, 68 Iowa, 107; Commonwealth v. Patch, 97 Mass. 221.

<sup>2</sup> State v. Fisher, 52 Mo. 174 (1873).

<sup>3</sup> Kneedler v. Norristown, 100 Pa. St. 368, approving text. Bacon Abr. tit. *By-Law*; Commonwealth v. Worcester, 3 Pick. (Mass.) 462 (1862); Paxson v. Sweet, 1 Green (N. J.), 196 (1832); Vandine, Petitioner, &c., 6 Pick. (Mass.) 187 (1828). Boston v. Shaw, 1 Met. (Mass.) 130, 135 (1840); Austin v. Murray, 16 Pick. (Mass.) 121, 125 (1834); Hudson v. Thorne, 7 Paige Ch. (N. Y.) 261; Commonwealth v. Stodder, 2 Cush. (Mass.) 562, 575 (1848); Commissioners v. Gas Co., 12 Pa. St. 318; Dunham v. Rochester, 5 Cow. (N. Y.) 462, 465 (1826); Buffalo v. Webster, 10 Wend. (N. Y.) 100; Brooklyn v. Breslin, 57 N. Y. 591, 596 (1874); Frank, *In re*, 52 Cal. 606, approving text. *Ante*, sec. 319.

“Where the municipal legislature has authority to act, it must be governed, not by our discretion, but by its own; and we shall not be hasty in convicting them of

being unreasonable in the exercise of it.” *Per* Lowrie, J., Fisher v. Harrisburg, 2 Grant (Pa.) Cases, 291 (1854); s. p. St. Louis v. Weber, 44 Mo. 547. “The courts,” says Dewey, J., “doubtless have the power to deny effect to a by-law obnoxious to the objection that it is unreasonable. It is, however, a power to be cautiously exercised,” especially where the question is a practical one,—for example, the length of time which ought to be allowed to vehicles to remain in the street, and as to which the city authorities, it is to be presumed, can judge better than the court. Commonwealth v. Robertson, 5 Cush. (Mass.) 438, 442 (1850). See, also, Vintners v. Passey, 1 Burr. 239; Workingham v. Johnson, Cas. temp. Hardw. 285; Poulter’s Co. v. Phillips, 6 Bing. N. C. 314; St. Paul v. Colter, 12 Minn. 41; Commonwealth v. Patch, 97 Mass. 221.

The doctrine of the text that the validity of a by-law is in all cases a *question for the court*, and that evidence to the jury is inadmissible, *has been denied* by the Supreme Court of Wisconsin, which, in Clason v. Milwaukee, 30 Wis. 316 (1872) (involving the validity of an ordinance to protect the harbor, and also the city,

§ 328 (262). **Legislative Authority to adopt what would otherwise be Unreasonable Ordinances.** — Where the *legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character*, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.<sup>1</sup>

§ 329 (263). **Must be consistent with Public Legislative Policy.** — The rule that a municipal corporation can pass no ordinance which conflicts with its charter or any general statute in force and applicable to the corporation, has been before stated.<sup>2</sup> Not only so, but it cannot, *in virtue of its incidental power* to pass by-laws, or under any general grant of that authority, adopt by-laws which infringe the spirit or are repugnant to the policy of the State as declared in its general legislation. This principle is well exemplified by a case in Ohio,<sup>3</sup> in which incorporated towns were, by statute,

from inundation by preserving the shore or beach), considered it to be no violation of principle, in a case where the reasonableness of the ordinance depended upon extrinsic facts, to submit testimony to the jury bearing upon the reasonableness of the requirements of the ordinance. But the argument of the counsel for the city, that this view makes the same by-law "valid in one case and invalid in another, according to the varying weight of testimony and the varying views of juries," seems unanswerable, and the text states probably the true doctrine. See Glover on Corp. 297, and cases in this note.

<sup>1</sup> Peoria v. Calhoun, 29 Ill. 317 (1862); St. Paul v. Colter, 12 Minn. 41 (1866); Brooklyn v. Breslin, 57 N. Y. 591, 596 (1874); A Coal-Float v. Jeffersonville, 112 Ind. 15; Breninger v. Belvidere, 44 N. J. L. 350; *post*, sec. 420. Speaking of a provision of the charter of the city of St.

Louis, authorizing the city authorities "to regulate," and, by construction, to permit *barndy houses*, and the objection made by counsel to an ordinance licensing such houses, Napton, J., says: "It is naked assumption to say that any matter allowed by the legislature is against public policy. The best indications of public policy are to be found in the enactments of the legislature. To say that such a law is of unusual tendency is disrespectful to the legislature, who, no doubt, designed to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern," when the legislative will has been plainly expressed. State v. Clarke, 54 Mo. 17, 36 (1873).

<sup>2</sup> See *ante*, secs. 89, 317, 319.

<sup>3</sup> Marietta v. Fearing, 3 Ohio, 427 (1831). See also Grand Rapids Electric,

prohibited from *subjecting stray animals* owned by persons *not residents* of such towns to their corporation ordinances. It was held that an ordinance operating, not on the animals but on the non-resident *owner*, in the shape of a penalty, violated the spirit of the statute, and was void. So, in a later case in the same State, it was shown that the general policy of the State was to allow animals to run at large; and it was ruled that a municipal corporation with power to pass "all by-laws deemed necessary for the well-regulation, health, cleanliness, &c.," of the borough, and with power to "abate nuisances," had no authority to pass a by-law restraining cattle from running at large, such a by-law being in contravention of the general law of the State.<sup>1</sup>

§ 330 (264). **Same subject.** — The general statutes of the State abolished the system of inspecting hay, and, in the place of it, the seller was required to prepare the article for market in a particular manner, at the peril of being subjected to certain designated penalties. In other words he was at liberty to dispose of his hay without inspection if he chose to do so. Under these circumstances, it was decided that a city ordinance, prohibiting the sale of pressed hay *without inspection*, was void, because it *conflicted with the laws of the State* upon the same subject.<sup>2</sup>

&c. Co. v. Grand Rapids Edison, &c. Co., 33 Fed. Rep. 659; *Ex parte* Chin Yan, 60 Cal. 78; Baltimore v. Scharf, 54 Md. 499.

<sup>1</sup> Collins v. Hatch, 18 Ohio, 523 (1849). But in *Illinois* it has been decided that a town, authorized by its charter to declare what should be nuisances, and to provide for the abatement thereof by ordinance, may pass an ordinance declaring *swine running at large* within the corporation to be nuisances, and providing for the taking up of the same, &c., and this though under the laws of the State the owners of stock may lawfully allow it to run at large upon the common, the court regarding the power named in the charter as abridging or limiting any right of common which might otherwise exist. Roberts v. Ogle, 30 Ill. 459 (1863). By-laws which contravene the policy of the general statutes of the State, by undertaking to punish acts which those statutes authorize, are void. Canton v. Nist, 9 Ohio St. 439, holding void a by-law, which, disregarding the statutory exceptions of

cases of necessity, charity, &c., prohibited the opening of shops for business on Sunday. Followed, Thompson v. Mount Vernon, 11 Ohio St. 688, adjudging an ordinance to be invalid because inconsistent with the liquor law of the State. And see Adams v. Mayor, &c., 29 Ga. 56; Sill v. Corning, 1 E. P. Smith (15 N. Y.), 297; Cincinnati v. Gwynne, 10 Ohio, 192; Wood v. Brooklyn, 14 Barb. (N. Y.) 425; Markle v. Akron, 14 Ohio, 586; Thomas v. Richmond, 12 Wall. 349 (1870). But a corporation may, in some cases, consistently with general law, *further regulate* by ordinance subjects already regulated by statute. Huddleson v. Ruffin, 6 Ohio St. 604; Rogers v. Jones, 1 Wend. (N. Y.) 237; State v. Welch, 36 Conn. 215 (1869).

<sup>2</sup> Mayor, &c. of New York v. Nichols, 4 Hill (N. Y.), 209 (1843). Compare Mayor v. Hyatt, 3 E. D. Smith (N. Y.), 156; Rogers v. Jones, 1 Wend. (N. Y.) 237. Construction of power to appoint weighmasters. Hoffman v. Jersey City, 34 N. J. L. 172 (1870).

*Of the Signing, Publication, and Recording of Ordinances.*

§ 331 (265). **Signing, Publication, and Recording.** — When ordinances are *required to be published* before they shall go into effect, this requirement is essential, and the publication must be in the designated mode. Until such publication be made, or until they have gone into operation, no penalty can be enforced under them.<sup>1</sup> Whether *the mayor's signature* is essential to the validity of an ordinance depends upon the charter; but unless made essential, such provisions, where the ordinance is duly enacted, have sometimes been regarded as directory.<sup>2</sup>

<sup>1</sup> *Barnett v. Newark*, 28 Ill. 62 (1862); *Conboy v. Iowa City*, 2 Iowa, 90 (1855); *Higley v. Bunce*, 10 Conn. 567 (1835); *Meyer v. Fromm*, 108 Ind. 208; *Napa v. Easterby*, 61 Cal. 509; *Wain v. Philadelphia*, 99 Pa. St. 330; *Schwartz v. Oshkosh*, 55 Wis. 490. Specified mode of publishing the proceedings of the council is essential. *State v. Hoboken*, 9 Vroom (38 N. J. L.), 110; *Ib.* 113; *Hoboken v. Gear*, 3 Dutch. (N. J.) 265. Failure to publish ordinance held not to affect validity of bonds issued under a subsequent act authorizing the corporation to incur a debt. *Amey v. Allegheny City*, 24 How. 364; *Clark v. Janesville*, 10 Wis. 136 (1859); *State v. Newark*, 1 Vroom (30 N. J. L.), 303; *People v. San Francisco*, 27 Cal. 655. Where publication for five successive days is required, a publication for five successive week-days is sufficient, though a Sunday intervenes when no paper is issued. *Ex parte Fiske*, 72 Cal. 125. Publication in a newspaper published *only on Sunday* held valid under the *Ohio* statute. *Hastings v. Columbus*, 42 Ohio St. 585. Under a charter forbidding the increase of salaries during terms of office, and providing that ordinances should *not take effect* until after publication for twenty days, an ordinance respecting salaries, adopted before a term began, but the last publication of which was after that time, was held to fix the salaries for that term. *Stuhr v. Hoboken*, 47 N. J. L. (18 Vroom) 147. Where the charter provided that a *failure to publish* should not make ordinances void unless the delay caused them to operate retrospectively, it was held that an ordinance became a

law without publication. *Schweitzer v. Liberty*, 82 Mo. 309. When *no provision* for the publication of ordinances is contained in a special charter, the promulgation should be reasonably sufficient to notify all parties interested, and the presumption is in favor of the reasonableness of the time adopted by the corporation, which must prevail unless countervailing facts are proved. *Pitts v. Opelika*, 79 Ala. 527, which further decides that a provision for publication contained in a general law applies only to municipalities organized under that law. Publication held *not necessary when not required* by the charter. *In re Guerrero*, 69 Cal. 88. In *Massachusetts* a provision by ordinance for the publication of ordinances is held to be *directory*, and not a condition precedent to their validity. *Commonwealth v. Davis*, 140 Mass. 485.

<sup>2</sup> *Blanchard v. Bissell*, 11 Ohio St. 96, 101, 103 (1860); *Striker v. Kelly*, 7 Hill (N. Y.), 9; *Elmendorf v. Mayor of New York*, 25 Wend. (N. Y.) 693. See, however, *Conboy v. Iowa City*, *supra*; *State v. Newark*, 1 Dutch. (N. J.) 399; *State v. Hudson*, 5 Dutch. (N. J.) 475; *Keyner v. Commonwealth*, 40 Pa. St. 124; *State v. Jersey City*, 1 Vroom (30 N. J. L.), 93; *Creighton v. Manson*, 27 Cal. 613; *Taylor v. Palmer*, 31 Cal. 241; *Dey v. Jersey City*, 19 N. J. Eq. 412; *State v. Jersey City*, 1 Vroom (30 N. J. L.), 93; *Ib.* 148; *State v. Newark*, 3 Dutch. (N. J.) 185 (1876); *Gas Co. v. San Francisco*, 6 Cal. 190; *State v. Henderson*, 38 Ohio St. 644; *Wain v. Philadelphia*, 99 Pa. St. 330; *Opelousas v. Andrus*, 37 La. An. 699; *New York & N. E. R. R. Co. v. Waterbury*, 55 Conn. 19 (holding also that

§ 332 (266). **Alternate Modes of Publication.**—Where *alternate modes of publication* of a by-law are allowed by statute, and the statute requires the *corporation* to direct which mode shall be adopted, a publication made by order of the clerk, without direction from or selection of the mode having been made by the corporation, is not valid.<sup>1</sup>

§ 333 (267). **Time of Publication.**—A municipal charter required every ordinance *to be published* for the space of *twenty days*

the fact that there was a practice of treating votes of the common council as approved by the mayor unless disapproved in writing, was immaterial). See *ante*, chapter on Corporate Meetings, sec. 293. Signing *minutes* not equivalent to signing resolution, when latter is essential. *Graham v. Carondelet*, 33 Mo. 262 (1862); but see *Woodruff v. Stewart*, 63 Ala. 206, where signing minutes was held sufficient. When to be signed. *Miles v. Bough*, 3 Gale & D. 119; *Inglis v. Railway Co.*, 16 Eng. Law & Eq. 55. Where another officer is *ex-officio* clerk of the council his signature to an ordinance as "clerk of the council" is a proper authentication of it. *In re Guerrero*, 69 Cal. 88. A legislative provision requiring the *presiding officer* of the council to *sign* all ordinances is directory in its nature. If regularly passed, an ordinance is valid, though not thus authenticated. It is, of course, competent for the legislature to make the signature an essential condition of validity. *Blanchard v. Bissell*, 11 Ohio St. 96, 101, 103 (1860); *Fisher v. Graham*, 1 Cin. (Ohio) 113 (1870); *ante*, sec. 293. See *State v. Newark*, 1 Dutch. (N. J.) 399. Signature of mayor not essential under general incorporation laws of *Indiana*. *Martindale v. Palmer*, 52 Ind. 411 (1876). No municipal ordinance is binding unless signed by the mayor and promulgated in the English language. *Breaux's Bridge, In re*, 30 La. An. 1105; *ante*, sec. 271, note. Where, by mistake, the date of approval by the mayor was entered as of a day prior to the passage of an ordinance, it was held, in a suit to collect a tax under the ordinance, that as all other requisites had been complied with and no one's rights had been prejudiced, the validity of the ordinance was not affected. *Allentown v. Grim*, 109

Pa. St. 113. Where the *charter required the mayor to sign ordinances* or return them within five days with his reasons for not doing so, an ordinance passed by the council, but which was not signed nor returned by the mayor, was held invalid. *In re Standiford*, 5 Mackey (Dist. of Col.), 549, and see *Pennsylvania Globe Gas Light Co. v. Scranton*, 97 Pa. St. 538. *Injunction does not lie* to prevent a mayor from signing an ordinance, even when the intended ordinance is a repeal of one under which a valid contract has been entered into. *New Orleans Elevated Ry. Co. v. New Orleans*, 39 La. An. 127. As to what may be considered *sufficient proof* of an ordinance having been signed by the mayor, see *Knight v. Kansas City, St. J. & C. B. R. Co.*, 70 Mo. 231. Bonds of a city signed by an ex-mayor held invalid. *Coler v. Cleburne*, 131 U. S. 162 (1889).

<sup>1</sup> *Higley v. Bunce* (restraining cattle), 10 Conn. 435; s. c. *Ib.* 567 (1835). The language of the statute was this: "Such by-laws shall not be in force until published four weeks in a newspaper printed in such town, or in the town nearest to such town in which a newspaper is printed, or in some other newspaper generally circulated in the town where such by-law is made, as the town shall direct." Rev. 1821, p. 458. *Held*, that the town must point out one of the three descriptions of newspapers in which the by-law should be printed. *Ib.* Mode of publication under the general incorporation law of *Illinois* of 1872. *Byars v. Mt. Vernon*, 77 Ill. 467 (1875). Special provisions construed. *Phillips, In re*, 60 N. Y. 16 (1875); *Bassford, In re*, 50 N. Y. 509 (1872). Certificate of city clerk of due publication not competent evidence unless made so by statute. *R. R. Co. v. Engle*, 76 Ill. 317 (1875).



in at least one newspaper before it should go into effect; and it was held that an ordinance would go into force in twenty days after its publication in the first number of the paper; that twenty days need not intervene between the first and last insertions; that it is clearly sufficient if it be published in each number of the paper issued within the twenty days, and probably sufficient if there is but one insertion, twenty days after which the ordinance will go into effect.<sup>1</sup> Where an ordinance has been once duly published, and it is afterwards included in a revision or digest of ordinances, no additional publication is necessary.<sup>2</sup>

§ 334 (268). *Proof of Publication.*—A charter provided that no ordinance should be *in force until published in some newspaper of the place*, and also declared that ordinances should be sufficiently proved in any court (among other modes) by a printed copy taken from the newspaper or printed pamphlet in which the same had been published, provided the same purports to have been done by authority of the corporation. Under this provision, the production of a newspaper published in the town, containing what appears as an ordinance, with a caption, "Published by Authority," duly signed, *is evidence* of the existence and adoption of the ordinance.<sup>3</sup> So where the charter provides that *ordinances published by authority of the corporation* shall be received in evidence without further proof, *a book of ordinances*, purporting to be thus published, is competent

<sup>1</sup> *Hoboken v. Gear*, 3 Dutch. (N. J.) 265 (1859). Where a city is required to *promulgate* its ordinances, it is sufficient to publish them in the newspaper in which the ordinances are *usually* published, though there may be other newspapers within the city. *Truchelut v. City Council*, 1 Nott & McC. (S. C.) 227 (1818); and see cases noted in sec. 331, note, *ante*.

<sup>2</sup> *St. Louis v. Foster*, 52 Mo. 513 (1873). "It would be of the most mischievous consequence to hold that the revision of a law had the effect of making the revised law entirely original, to be considered as though none of its provisions had effect but from the date of the revised law. When a former provision is included in a revised law, it is only thereby intended to continue its existence, not to make it operate as an original act, to take effect from the date of the revised law. The revision has not the effect to break the continuity of those provisions

which were in force before it was made." *St. Louis v. Alexander*, 23 Mo. 509. Exception to rule, see *Emporia v. Norton*, 16 Kan. 236 (1876).

<sup>3</sup> *Block v. Jacksonville*, 36 Ill. 301 (1865). Authorized book of ordinances is *prima facie* evidence of due passage and publication of the ordinances therein contained. *Prell v. McDonald*, 7 Kan. 426 (1871); s. c. 12 Am. Rep. 423. See *Pendergast v. Peru*, 20 Ill. 51. Proof of publication under special charter provision. *St. Charles v. O'Malley*, 18 Ill. 407; *Moss v. Oakland*, 88 Ill. 109. In an action against a city, plaintiff need not prove the publication of an ordinance offered in evidence, where he shows that the city had for several years acted upon the ordinance as in force. *Atchison v. King*, 9 Kan. 550 (1872); *State v. Atlantic City* (burden of proof), 5 Vroom (34 N. J. L.), 99, 106. A note upon the record of an ordinance stating that it had been duly

evidence, without further authentication; but it is not, of course, conclusive.<sup>1</sup>

§ 335 (269). **Recording Ordinances.**—A provision in a statute changing an incorporated town into a city, that the existing town ordinances shall remain in force provided they *shall be recorded* within four months thereafter, is merely directory, and such ordinances are valid, though not recorded within the designated period.<sup>2</sup> Nor is it a valid objection to a municipal ordinance that it is recorded in print (being printed and pasted in the proper book), and not in manuscript.<sup>3</sup>

*Of the Power to impose Fines, Penalties, and Forfeitures.*

§ 336 (270). **Common-Law Principles adopted.**—That by-laws or ordinances may not be inoperative or useless, it is necessary that *some penalty should be annexed to the breach of them*; and it is settled in England, in accordance with the principles of Magna Charta, that without the express sanction of parliament, no by-law can be enforced by disfranchisement of the offender, or by his imprisonment, or by forfeiture of his goods or property. Under incidental power to pass by-laws, a corporation may, in England, annex pecuniary penalties of a certain, fixed and reasonable character, but without express authority given by a statute, the only penalty it can prescribe is a pecuniary one, usually called a fine. Therefore in the absence of a statute or special custom justifying it, a by-law cannot give a power of distress and sale of the goods of the offender, since such a power is contrary to the common law. And where a corporation is empowered to enforce its by-laws in a special manner, as by fine, it is limited to the manner prescribed. These safe, salutary, and enlightened principles of law have been recognized by the American courts as applicable to the ordinances of our municipal corporations, as the cases to which reference is made fully show.<sup>4</sup>

published, held *prima facie* proof of the fact of publication. *Downing v. Miltonvale*, 36 Kan. 740.

<sup>1</sup> *St. Louis v. Foster*, 52 Mo. 513 (1873); *Lindsay v. Chicago*, 115 Ill. 120; *ante*, sec. 310, note.

<sup>2</sup> *Trustees of Academy v. Erie*, 31 Pa. St. 515 (1858); *Amey v. Allegheny City*, 24 How. 364; *Tipton v. Norman*, 72 Mo. 380. See chapter on Corporate Records and Documents, *ante*.

<sup>3</sup> *Ewbanks v. Ashley*, 36 Ill. 177 (1864). *Parol evidence of resolutions is*

competent where the charter does not require them to be recorded, and no record thereof has been made. *Darlington v. Commonwealth*, 41 Pa. St. 68. See *ante*, sec. 310.

<sup>4</sup> In *Louisiana*, in a case where an ordinance required property owners to make their sidewalks conform to a uniform grade *under pain of a fine or imprisonment*, in default of payment of the fine, it was held by *Bermudez, C. J.*, citing this section, that "a municipal corporation has no right to enforce obedience to the ordi-

§ 337 (271). **Statutory regulation of Fines and Penalties under Ordinances.**—By the *Municipal Corporations Act*, the subject of by-laws and their penalties is regulated. It is declared “that it shall be lawful for the council of any borough to make such by-laws as shall to them seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of an act in force throughout such borough, and to appoint, by such by-laws, such fines as they shall deem necessary for the prevention and suppression of such offences ; provided that no fine, to be so appointed, shall exceed the sum of five pounds, and that no such by-law shall be made, unless at least two-thirds of the whole number of the council shall be present.”<sup>1</sup> Respecting the fines mentioned in this section, Mr. Rawlinson suggests the inquiry whether it be necessary or not that the *exact amount* of each fine should be mentioned in the by-law, the limit, to wit, 5*l.*, being fixed by the act. It is contended, he observes, by some persons, that the amount may be left open, and that a by-law, enacting that the offence shall be punishable by a fine not less than 10*s.* and not exceeding 5*l.*, would be valid. This would be convenient, but some have doubted whether the corporation could enforce it by the usual common-law remedies, viz., by an act of debt or assumpsit. It is believed, he adds, that by-laws have invariably fixed the exact sum ; but, nevertheless, it would seem that a fine of 5*l.*, with power to the mayor or other officer to reduce it to any sum not exceeding a specified amount, would be good.<sup>2</sup> In this country, the practice, if not general, is at least not uncommon, to prescribe limits to fines, and allow them to be imposed within those limits, at the discretion of the magistrate or court entrusted with jurisdiction to hear complaints for breaches of municipal ordinances.<sup>3</sup>

nances which it has the power to pass, by fine or imprisonment, or other penalty, unless that right has been *unquestionably* conferred by the lawgiver ; for this is inflicting a punishment for the commission or omission of an act declared an offence, a prerogative which, as a rule, appertains to the sovereignty only.” *State v. Bright*, 38 La. An. 1 ; see also *Slessman v. Crozier*, 80 Ind. 487.

<sup>1</sup> 5 & 6 Wm. IV. ch. lxxvi. sec. 90 ; *ante*, sec. 35, and note ; *post*, sec. 408.

<sup>2</sup> Rawlinson on Corp. (5th ed.) 165, 166, note ; *post*, sec. 341 ; Piper v. Chappell, 14 M. & W. 624 ; Peters v. London, 2 Upper Can. Q. B. 543 ; Fennell, *In re*,

24 Upper Can. Q. B. 238, 243 ; Snell, *In re*, 30 Upper Can. Q. B. 81.

<sup>3</sup> In England it is held that where the statute gives a discretion, either as to the amount of the penalty or its application, the justice must, on the face of the conviction, show in what manner the discretion has been exercised. *The King v. Dimpsey*, 2 Term R. 96 ; *The King v. Symonds*, 1 East, 189 ; *Boothroyd, In re*, 15 M. & W. 1 ; *The King v. Seale*, 8 East, 568, 573 ; *The King v. Smith*, 5 M. & S. 133 ; *The Queen v. Johnson*, 8 Q. B. 102 ; *Wray v. Toke*, 12 Q. B. 492 ; see also *The King v. Wyatt*, 2 Ld. Raym. 1478 ; *The King v. Priest*, 6 Term R. 538.

§ 338 (272). **Implied Power to annex Pecuniary Penalties.**— Since an ordinance or by-law without a penalty would be nugatory,<sup>1</sup> municipal corporations have an implied power to provide for their enforcement by reasonable and proper fines against those who break them.<sup>2</sup> So the right to make by-laws gives to the corporation, without any express grant of power, the incidental right to enforce them by reasonable pecuniary penalties. What is reasonable depends upon the nature of the offence and the circumstances.<sup>3</sup>

§ 339 (273). **Charter Mode governs.**— Where the charter or organic act prescribes the *manner* in which by-laws are to be enforced, or the sanctions or *punishments* to be annexed to their vio-

It was held in *New Jersey*, where the charter authorized the council to enforce their ordinances by a penalty not exceeding fifty dollars, that the council must prescribe a precise penalty for each offence, and therefore an ordinance declaring a penalty for its violation not exceeding fifty dollars was void. *State v. Zeigler*, 3 Vroom (32 N. J. L.), 262; followed in *Melick v. Washington*, 47 N. J. L. (18 Vroom) 254. In *North Carolina* the law is that fines imposed by ordinances *must be fixed in amount* and cannot be left to the discretion of the court. Ordinances prescribing a fine of "not more than" a sum specified are therefore void for uncertainty and vagueness. *State v. Worth*, 95 N. C. 615; *State v. Crenshaw*, 94 N. C. 877; *State v. Cainan*, 94 N. C. 883. The provision for a fine not exceeding \$500 for such trivial offences as most of those covered by the ordinance before the court (one prohibiting processions without the consent of the mayor, *ante*, sec. 319, note), the council exercising no discretion, but turning this great power over to the courts, without any classification, held void. How far a sliding scale of penalties is allowable not decided, but the court said they must be reasonable whether sliding or fixed. *Per Campbell, C. J., In re Frazee*, 63 Mich. 396 (1886); s. c. 30 N. W. Rep. 72; 35 Alb. L. J. 6, citing *Grand Rapids v. Hughes*, 15 Mich. 54; see *post*, secs. 340, 341, 410; *Harr. Munic. Man.* 360.

<sup>1</sup> *State v. Cleaveland*, 3 R. I. 117. But no penalty can be enforced for an illegal exaction. *Mayor v. Third Avenue Railroad Co.*, 33 N. Y. 42; *Mayor v. Second*

*Avenue Railroad Co.*, 32 N. Y. 261. "*Municipal fine*," as used in the Constitution of *California*, means a fine imposed by local laws of particular places, such as incorporated towns and cities, and not a fine imposed by the general laws of the State. *People v. Johnson*, 30 Cal. 98 (1866).

<sup>2</sup> *Fisher v. Harrisburg*, 2 Grant (Pa.) Cas. 291 (1854); *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253; *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382 (1869). The amount must be reasonable. *Zylstra v. Charleston*, 1 Bay (S. C.), 382. The penalty, says Mr. Willcock, must be imposed on the person who violates the by-law. Thus, if goods be sold by an unauthorized person within the city, the penalty must be imposed on the seller, and not on the buyer; for how can he distinguish between those authorized to sell and those who are not? Willc. on Corp. 154, pl. 369, 370; *Cuddon v. Eastwick*, 1 Salk. 143, 192; s. c. 6 Mod. 124; and see, also, *Fazakerly v. Wiltshire*, 1 Stra. 469. The rule stated above, as to the person on whom penalties must be imposed, may be extended or enlarged by express provisions of the organic act of the corporation.

<sup>3</sup> *Mayor, &c. of Mobile v. Yuille*, 3 Ala. 137 (1841). A penalty, although small, fixed on every stroke of the hammer which an unauthorized person uses in his trade of a goldsmith, is unreasonable. Willc. 154, pl. 368. Same principle, *Mayor, &c. of New York v. Ordrenan*, 12 Johns. (N. Y.) 122 (1815). See, *ante*, chap. x., *Municipal Courts*.

lation, this constructively operates to negative the right of the corporation to proceed in any other manner or to inflict any other punishment. Thus, in the leading case<sup>1</sup> on this subject, the charter prescribed in what manner by-laws should be enforced, namely, by *fine* and *amercement*, or either, and it was decided that the corporation was precluded from declaring a *forfeiture* of property, or from inflicting any other punishment; and the doctrine of this case has been everywhere followed in the courts of this country.

§ 340 (274). **Same subject.** — A charter of a city specifically enumerated various powers, which the council was expressly authorized to enforce by a penalty not exceeding one hundred dollars for their violation; and the same charter empowered the council to prevent and remove encroachments upon the streets, but was silent as to the imposition of penalties for a violation of its provisions. The council passed an ordinance *imposing a continuing penalty of ten dollars a day for every day's failure* to remove an encroachment, after notice; and it was held, and properly so, that it possessed no

<sup>1</sup> *Kirk v. Nowill*, 1 Term R. 118, 124 (1786), *per Mansfield and Buller*: followed in *Hart v. Mayor, &c.* 9 Wend. (N. Y.) 571, 588, 606 (1832); *Cotter v. Doty*, 5 Ohio, 393 (1832); *Heise v. Town Council*, 6 Rich. (S. C.) Law, 404 (1853); *Miles v. Chamberlain*, 17 Wis. 446 (1863). In *Hart v. Mayor, supra*, it was accordingly decided that a corporation having authority "to inflict penalties for the violation of any by-law, not exceeding \$25 for any one offence," could not pass a by-law subjecting property to *seizure* and *sale*, or *forfeitting* it, even though it was used contrary to the by-law, which was in other respects valid, the remedy for enforcing their by-laws having been specified. *Hart v. Mayor*, 9 Wend. (N. Y.) 571; *ante*, sec. 248; *post*, sec. 818.

Where *specific modes* of procedure and penalties are prescribed against persons failing to take out license for keeping drinking-houses, as fines, suits, and prosecutions, a municipal corporation, in the absence of express grant, has no right to close the doors of a drinking-house *summarily*, because the keeper has failed to take out a license. *Bolte v. New Orleans*, 10 La. An. 321 (1855). That a municipal corporation cannot *annex other or greater penalties* than those authorized in its or-

ganic act, that power to punish by "fine" is exclusive, and that it is not competent to order a forfeiture in addition, see *Schroder v. City Council*, 2 Const. Rep. (S. C.) 726; s. c. 3 Brev. 533 (1815); *McMullen v. City Council*, 1 Bay (S. C.), 46; *Zylstra v. Charleston, Ib.* 382; *New Orleans v. Costello*, 14 La. An. 37; *Columbia v. Hunt*, 5 Rich. (S. C.) 550, 558; *Kennedy v. Sowden*, 1 McMullan (S. C.), 328; compare *Crosby v. Warren*, 1 Rich. (S. C.) Law, 385. An ordinance treated as wholly void because it fixed the minimum fine for an offence at five dollars when the law required it to be three dollars. *Petersburg v. Metzker*, 21 Ill. 205 (1859). A party cannot enjoin the collection of a fine and costs imposed for the violation of a city ordinance, on the ground of there being no offence charged or cause of action stated before the mayor. The remedy in *Indiana* in such case is by appeal. *Schwab v. Madison*, 49 Ind. 329 (1874). The city of *New Orleans* has power to inflict fines and imprisonment under its police power only, and cannot apply them to violators of ordinances for the raising of a revenue, — as for selling vegetables without paying for the privilege. *State v. Patamia*, 34 La. An. 750.

power to impose such a penalty; but the decision was put upon the ground that the specific enumeration of the powers which might be rendered effectual by penal provisions *was an implied exclusion* of the right to impose any penalties whatever in other cases.<sup>1</sup>

§ 341 (275). **Penalty may be within Fixed Limits.** — A municipal corporation, with power to pass by-laws and to affix penalties, may, if not prohibited by the charter, or if the penalty is not fixed by the charter, make it *discretionary, within fixed reasonable limits*, for example, "not exceeding fifty dollars." The maximum limit must of course be reasonable. This enables the tribunal to adjust the penalty to the circumstances of the particular case, and is just and reasonable. The older English authorities, so far as they hold such a by-law void for uncertainty, are regarded as not sound in principle, and ought not to be followed.<sup>2</sup>

§ 342 (276). **Single Offence cannot be made Double.** — As the power to pass ordinances and to punish for their violation must be reasonably exercised, *the corporation cannot multiply one offence into many*, and punish for each. Thus, where an authorized ordinance prohibited "any person from cutting down and making use of cedar and other trees," within a specified locality, a complaint, charging the defendant "with having cut down a cedar tree at various times,

<sup>1</sup> *Grand Rapids v. Hughes*, 15 Mich. 54 (1866). Whether there is such an implied exclusion must depend in each case upon the supposed intention of the legislature, to be gathered from a survey of the whole charter. The authority to adopt an ordinance implies the right to enforce it by proper pecuniary penalties, and this right exists unless excluded by other provisions of the charter. *Supra*, sec. 338. In *Maryland* it is held when a municipal corporation is seeking to enforce an ordinance which is void, that a court of equity has jurisdiction, at the suit of any person who is injuriously affected thereby, to stay its execution by injunction. *Baltimore v. Radecke*, 49 Md. 217; s. c. 21 Alb. Law Jour. 117; but see Index, tit. *Injunction*.

<sup>2</sup> *Mayor, &c. v. Phelps*, 27 Ala. 55 (1855), overruling, on this point, *Mayor, &c. v. Yuille*, 3 Ala. 137; compare *Comm'rs v. Harris*, 7 Jones (Law), 281. See, also, *Piper v. Chappell*, 14 Mees. & W. 624, 649 (1845); *Butchers' Co. v. Bullock*, 3 B. & Pul. 434; *Grant on Corp.* 84;

*Fennell, In re*, 24 Upper Can. Q. B. 238; *State v. Cantieny*, 34 Minn. 1. A by-law fixing one penalty for the first offence, and a larger for the second, and a still larger one for every subsequent offence, does not appear to be bad for uncertainty. *Butchers' Co. v. Bullock, supra*. Where the penalty is fixed by by-law, it can only be changed by the same authority which affixed it. *Rex v. Ashwell*, 12 East, 29; *Scarning v. Cryer*, 3 Leon. 7; *Moore*, 75; *Bendl*, 159; *Davies v. Lowden, Carter*, 29. A penalty fixed either by the charter or by-law is essential. *Bowman v. St. John*, 43 Ill. 337; *Ashton v. Ellsworth*, 43 Ill. 299; *supra*, secs. 337, 338; *infra*, sec. 343. The old English rule stated in the text was followed in *New Jersey* (*State v. Zeigler*, 3 Vroom (32 N. J. L.), 262; *Mellick v. Washington*, 47 N. J. L. (18 Vroom) 254); but the reason of the matter and the general practice in this country is otherwise, and the text states correctly, we think, the American doctrine. See cases in note to sec. 337, *supra*.

and that he continued to do so, from time to time, until he had committed one hundred violations of the ordinance, by cutting down one hundred cedar trees," was held to set forth but a *single* offence; for, said the court, "the matter charged is a trespass with a *continuando*, which in law is but one offence, and it may well be that every tree cut by the defendant was cut on *one* day, and, under the ordinance, the cutting of more trees than one, at *one time*, would be but one offence."<sup>1</sup>

§ 343 (277). **Limitation of Amount of Penalties.**—Where there is a limitation upon the corporation as to the *amount of penalties* to be imposed for the infraction of by-laws, they cannot exceed the limit directly, nor can they do so indirectly by multiplying what is in substance one offence into several, or subdividing one transaction or violation into a number of offences, and annexing a penalty to each.<sup>2</sup> But where each offence is distinct, and the punishment for each is within the power of the corporation to impose, the punishment is not made illegal, though the separate fines in the aggregate exceed the limit allowed by the charter, and are imposed by the same magistrate or tribunal at one sitting.<sup>3</sup>

§ 344 (278). **Same subject.**—By its charter, the *power of a city corporation to impose fines* for breaches of its ordinances was limited to one hundred dollars. By the charter the city had also the power to regulate the inspection of flour, and it passed an ordinance by which any person selling flour without inspection should be fined "five dollars for each barrel so sold." It was held that this ordinance, as to the penalty, was valid, so far as to authorize a fine not exceeding one hundred dollars; that if a single sale exceeded twenty barrels, the fine could be but one hundred dollars, while if it was less than twenty barrels, the fine would be five dollars on each barrel. The court observed that a recovery on a single transaction where more than twenty barrels were sold would bar any future proceeding for the balance.<sup>4</sup>

<sup>1</sup> *State v. Moultrieville, Rice* (S. C.) Law, 158 (1839); *Harr. Munic. Man.* 361.

<sup>2</sup> *Mayor, &c. of New York v. Ordrenan*, 12 Johns. (N. Y.) 122 (1815) (penalty for illegally keeping powder), citing and approving opinion of Lord Mansfield in *Crepps v. Durden*, Cowp. 640. See also, *Hart v. Mayor, &c.*, 9 Wend. 571, 588, 606 (1832); *Zylstra v. Charleston*, 1 Bay (S. C.), 382 1794; *vide Stokes v.*

*Corporation of New York*, 14 Wend. (N. Y.) 87. *Continuing offence.* *Marshall v. Smith*, L. R. 8 C. P. 416. *Supra*, secs. 337, 341.

<sup>3</sup> *Heise v. Town Council*, 6 Rich. (S. C.) Law, 404 (fines for violating liquor ordinance); compare *State v. Moultrieville*, *supra*.

<sup>4</sup> *Chicago v. Quimby*, 38 Ill. 274 (1865).

§ 345 (279). **Power of Forfeiture must be Expressly Conferred.** —

A corporation, under a general power to make by-laws, cannot make a by-law ordaining a *forfeiture of property*. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that it must be *plainly*, if not, indeed, *expressly* conferred by the legislature.<sup>1</sup> And even if the power to declare a forfeiture is conferred, still no person can, by ordinance, be deprived of his property by forfeiture without notice or without legal investigation or adjudication; an ordinance in violation of this principle is void, as "contrary to the genius of our laws and institutions."<sup>2</sup> In England the power of municipal corporations to impose a forfeiture for offences created by ordinances or by-laws has been, in many cases, sanctioned by *usage*, without any express power in the charter to impose the forfeiture. But in this country, inasmuch as corporations derive all their power from charter or act of the legislature, the right to inflict a forfeiture must be plainly given, and cannot be derived from usage.<sup>3</sup>

§ 346 (280). **Power to Fine does not include Power to Forfeit.** —

How strictly the courts hold that municipal corporations *cannot, in the absence of clear statute authority, pass by-laws ordaining a forfeiture*, is strikingly illustrated by the case of *Heise v. The Town Council of Columbia*. The town council had power to enforce obedience to their ordinances "*by fine, not exceeding fifty dollars.*" Special authority was given to municipal corporations to grant licenses to retail liquor. The council passed an ordinance relating to this subject, the penalty for violating which was a "fine of not more than fifty dollars for each offence, and also a *forfeiture of the license.*" It was

<sup>1</sup> *Kirk v. Nowill*, 1 Term R. 118, 124, *per Mansfield and Buller*, followed by Court of Errors of New York, in *Hart v. Mayor, &c. of Albany*, 9 Wend. (N. Y.) 571, 588, *per Sutherland, J.*; p. 605, *per Edmonds*, Senator; 2 Kyd on Corp. 110; Willcock on Municipal Corporations, 180, pl. 449; Angell & Ames on Corp. sec. 360; *Cotter v. Doty*, 5 Ohio, 394 (1832); *White v. Tallman*, 2 Dutch. (N. J.) 67 (1856); *Clerk v. Tucket*, 3 Lev. 281; *Lee v. Wallis*, 1 Kenyon, 292; *Adley v. Reeves*, 2 Maule & S. 60; *Phillips v. Allen*, 41 Pa. St. 481. In further illustration see *Mayor, &c. v. Ordrenan*, 12 Johns. (N. Y.) 122; *Dunham v. Rochester*, 5 Cowen (N. Y.), 462 (1826); *Baxter v. Commonwealth*, 3 Pa. (Pen. & W.) 253;

*Bergen v. Clarkson*, 1 Halst. (N. J.) 352; *Taylor v. Carondelet* (forfeiture of lease), 22 Mo. 105, 112; *Mayor, &c. of Mobile v. Yuille*, 3 Ala. 137 (1841); *Miles v. Chamberlain*, 17 Wis. 446; *Donovan v. Vicksburg*, 29 Miss. 247; *Cincinnati v. Buckingham*, 10 Ohio, 257; *Wilcox v. Hemming*, 58 Wis. 144; *post*, sec. 348; *Harr. Munic. Man.* 311, 313.

<sup>2</sup> *Cotter v. Doty*, 5 Ohio, 393, 398; *Rosebaugh v. Saffin*, 10 Ohio, 32 (1840); *Slessman v. Crozier*, 80 Ind. 487.

<sup>3</sup> *Taylor v. Carondelet*, 22 Mo. 105, 112; *Kirk v. Nowill*, 1 Term R. 118; *Adley v. Reeves*, 1 Maule & Sel. 60; *Varden v. Mount*, 78 Ky. 86, citing text.



held that the license which was granted and paid for was essentially *property*; that the council could only impose *finer*, and that it had no power to ordain a forfeiture of the license, there being (in the opinion of the court) no difference between the forfeiture of a license and of goods and chattels.<sup>1</sup>

§ 347 (281). **Judicial Procedure necessary in some Instances.**—An ordinance of the city of New Orleans *authorizing* without any prior judicial proceedings, *a sale, under the orders of the mayor, of all property suffered to remain on the levee beyond a specified period*, is invalid, since it makes the corporation judges and parties in the same cause, and enforces a forfeiture, and divests the owner of his property without a trial in due course of law. Such a power is not similar to that exercised by a corporation in removing nuisances, as that power arises from necessity and ceases with that necessity. It would be competent for the corporation to ordain that the property should be removed at the expense of the proprietor, and to recover these expenses, and any fine which might be imposed, by judicial proceedings.<sup>2</sup>

§ 348 (282). **Forfeiture of Animals at Large; Notice; Legal Proceedings.**—The right to denounce a *forfeiture against animals running at large* in a town or city, contrary to the provisions of ordinances forbidding it, must be plainly conferred or it will not be held to

<sup>1</sup> Heise v. Town Council, &c., 6 Rich. (S. C.) Law, 404 (1853). As to revocation of unexpired license for sale of intoxicating liquors, State v. Cook, 24 Minn. 247 (1877). License to sell liquor under the laws of the State is not a contract, and may be terminated by a repeal of the law. Fell v. State, 42 Md. 71 (1875); s. c. 20 Am. Rep. 83. State v. Bonnell (Sup. Ct. Ind.), 21 N. E. Rep. 1101 (1889). The revocation by a municipal corporation of a license to sell intoxicating liquors upon certain specified conditions, a violation of which, according to the terms of the license, should have the effect to revoke it, is not a *forfeiture* beyond the powers of the corporation. Hurber v. Baugh, 43 Iowa, 514 (1876).

<sup>2</sup> Lanfear v. Mayor, 4 La. 97 (1831). Compare with Guillotte v. New Orleans, 12 La. An. 432 (1857), in which it was held that an ordinance providing a forfeiture, for the use of the city workhouse, of

bread illegally baked in violation of an authorized by-law of the corporation, is not contrary to a constitutional provision declaring that vested rights shall not be divested unless for purposes of public utility and for adequate compensation previously made. It may be observed that the court, without any special discussion, assumed that power "to regulate everything which relates to bakers" gave authority to denounce a forfeiture of bread baked contrary to the provisions of the ordinance of the city. See, on this point, Mayor, &c. of Mobile v. Yuille, 3 Ala. 137 (1841). Assize of bread has been deemed necessary from an early period in England. Burn's Justice, title "Bread." Construction of English statute regulating sale of bread. Queen v. Wood, L. R. 4 Q. B. 559; Queen v. Kennett, L. R. 4 Q. B. 567; Aerated Bread Co. v. Gregg, L. R. 8 Q. B. 355.

exist.<sup>1</sup> This is in accordance with the rule of the English courts, that a statute will not be taken to invest, by implication, a municipal corporation with the extraordinary powers of forfeiting the property of the subject, and that, if it be intended that any such power shall be given, it must be by express words to that effect. The cases agree in holding that when the power to denounce the forfeiture against such animals is given, *there should be notice, either actual or constructive, or prior legal proceedings*. The view of the courts will be best understood by referring to some of the cases upon the subject. In Mississippi, an ordinance authorizing the seizure and sale of hogs running at large, without notice or trial, or opportunity for trial, and providing that one half of the proceeds of the sales should go to the hospital and the other half to the city marshal, was held to be in violation of the constitutional provision that no person "can be deprived of his property but by due course of law," and securing right to a jury trial.<sup>2</sup>

§ 349 (283). **Same subject.**—In a similar case in Ohio, Grimke, J., delivering opinion of the court, observes: "The ordinance commands the marshal to seize and impound the hogs, and then, without any reserve, *without any notice*, by means of which the owner might be able to exculpate himself, directs them to be sold and the proceeds placed in the city treasury. Such an ordinance is as contrary to the spirit of the charter (Cincinnati) as it is alien from the general genius of our institutions."<sup>3</sup>

<sup>1</sup> Varden v. Mount, 78 Ky. 86; Wilcox v. Hemming, 58 Wis. 144; Knoxville v. King, 7 Lea (Tenn.), 441, approving the text.

<sup>2</sup> Donovan v. Vicksburg, 29 Miss. (7 Cush.) 247 (1855); Poppen v. Holmes, 44 Ill. 362; Darst v. People, 51 Ill. 286; Heise v. Columbia, 6 Rich. 404; Whitfield v. Longest, 6 Ire. (N. C. Law) 268; McKee v. McKee, 8 B. Mon. (Ky.) 433; Jarman v. Patterson, 7 Mon. (Ky.), 647; Varden v. Mount, 78 Ky. 86 (1879); s. c. 10 C. L. J. 73. Power to impose penalties on the owners of animals running at large excludes, by implication, the power to enforce a by-law upon the subject in any other way; as, for example, by a sale of the animals found at large. Miles v. Chamberlain, 17 Wis. 446 (1863); *supra*, secs. 338, 339; Brophy v. Hyatt, 10 Col. 223; Cartersville v. Latham, 67 Ga. 753. An ordinance directing the *impounding and sale of animals* for

costs and expenses, but not imposing a penalty, held valid under a charter authorizing the impounding and sale "for any penalty imposed by any ordinance or regulation, and all costs." Fort Smith v. Dodson, 46 Ark. 296. Such an ordinance is valid, and takes effect whether the owner resides in the town or not. Rose v. Hardie, 98 N. C. 44; *infra*, sec. 355, note.

<sup>3</sup> Rosebaugh v. Saffin, 10 Ohio, 32, 37 (1840). However it may be when the power to forfeit without notice or prior legal proceedings is *explicitly conferred*, it is clear that the power, unless plainly and expressly given, cannot be exercised without such notice and previous adjudication; but with these the remedy may, if needful, be "prompt and strong." Cincinnati v. Buckingham, 10 Ohio, 257, 262, *per Lane*, C. J. What is a *running at large*. Kinder v. Gillespie, 63 Ill. 88 (1872); Case v. Hall, 21 Ill. 632.

§ 350 (284). **Same subject. Notice.**—In North Carolina the general principle was declared that an ordinance of an incorporated town which authorizes the property of one man to be taken from him and given to another, without any *notice* to the owner or trial of his rights, was unlawful. The town authorities, under power given to make ordinances for the removal of nuisances and for the good government of the town, passed an ordinance to this effect: "That every hog at large in the said town shall be taken up and penned, and advertised to be sold on the third day; and unless the owner should pay the charges (specified in the ordinance) for taking up and keeping such hog, and a sale is effected, the money arising therefrom, after paying the charges, shall be paid over to the *owner* of the said hog." The validity of this ordinance was drawn in question, and two points were ruled by the Supreme Court: 1. That the ordinance was reasonable, and the corporation, under the power above referred to, had authority to pass it; 2. That it sufficiently provided for notice to the owner by the impounding of the animal, and the three days' public advertisement, and that personal notice was not necessary.<sup>1</sup> In a subsequent case in the same court a similar ordinance was sustained. It was objected that it was invalid, because it provided for no judicial decision condemning the property to be sold. This objection the court regarded as insufficient, "since the owner may, if he choose, have a full investigation of the case by bringing an action of replevin, as in any other case of distress."<sup>2</sup>

§ 351 (285). **Same subject.**—In South Carolina it has been held that under authority *to enforce by-laws by fine*, an ordinance, otherwise legal, which authorized the marshal to kill hogs running at large, contrary to the ordinance, and appropriate them to his own use, was void.<sup>3</sup>

<sup>1</sup> *Shaw v. Kennedy* (N. C.), Term R. 158 (1817); *Hellen v. Noe*, 3 Ire. (N. C. Law) 493 (1843). Same principle. *Spitler v. Young*, 63 Mo. 42 (1876), holding that such an ordinance was unauthorized as a sanitary or police regulation under power to abate nuisances.

<sup>2</sup> *Whitfield v. Longest*, 6 Ire. (Law) 268 (1846). In *Iowa* a similar ordinance was sustained. *Gosselink v. Campbell*, 4 Iowa, 296 (1856); *Gilchrist v. Schmidling*, 12 Kan. 263 (1873). *Contra*, *Willis v. Legris*, 45 Ill. 289 (1867); *Bullock v. Geomble*, *Id.* 218; *Poppen v. Holmes*, 44 Ill. 360. But see *Hart v. Mayor, &c. of*

*Albany*, 9 Wend. (N. Y.) 571 (1832); *White v. Tallman*, 2 Dutch. (N. J.) 67 (1856); *Phillips v. Allen*, 41 Pa. St. 481; *Moore v. State*, 11 Lea, 35; *Knoxville v. King*, 7 Lea, 441. Power must be strictly pursued, or the sale will be void, and the officer a trespasser. *Clark v. Lewis*, 35 Ill. 417. See *Friday v. Floyd*, 63 Ill. 50 (1872), three judges dissenting. Sale is void where two animals belonging to different owners are sold at once. *Id.*

<sup>3</sup> *McRae v. O'Lain*, cited *Kennedy v. Sowden*, 1 McMullan (S. C.) Law, 328. But authority to impose "*finis and penalties*" authorizes a fine against those who

§ 352 (286). **Equity will not ordinarily relieve against Valid Forfeitures.** — A forfeiture imposed by a municipal corporation, under legislative authority, for a violation of a valid by-law, and inflicted as a penalty for such violation, *cannot be relieved against in equity*, unless, perhaps, where peculiar circumstances furnish grounds for equitable interposition, the general doctrine being that equity may relieve against forfeitures declared by contract, but not against those expressly declared or authorized by statute.<sup>1</sup>

§ 353 (287). **Power to enforce by Imprisonment must be expressly given.** — In this country it is not unusual to provide, in the organic act of municipal corporations, that if fines for violation of by-laws or ordinances are not paid, *the offender may be committed to prison* for a limited period. And in respect to some offences public in their character, the power to imprison in the first instance is often conferred.<sup>2</sup> It is scarcely necessary to add that unless the authority be plainly given, it does not exist; and when given, before it can be exercised there must be a judicial ascertainment by a competent tribunal or magistrate of the guilt of the party.<sup>3</sup>

violate the ordinance forbidding hogs running at large, and the seizure, impounding, and sale (upon notice) of the animals to pay the fine, whether they belong to residents or non-residents. *Kennedy v. Sowden*, *supra*; *s. v. Crosby v. Warren*, 1 Rich. (S. C.) Law, 385 (1845); *Wardlaw, J.*, dissenting; *McKee v. McKee*, 8 B. Mon. (Ky.) 433 (1848); see *Kinder v. Gillespie*, 63 Ill. 88 (1872). But it seems doubtful, upon the principles adopted in the construction of powers of this character, whether authority to impose fines and penalties extends any further than to the imposition of *pecuniary fines and penalties*. See *Mayor of Mobile v. Yuille*, 3 Ala. 137; *White v. Tallman*, 2 Dutch. (N. J.) 67 (1856). The power to forfeit, like the power to tax, should be given either expressly, or, at all events, by *necessary* implication. And it has been held that it cannot be implied from the power "to impose reasonable fines," and to cause "all such fines and all such forfeitures and penalties as may be incurred under the laws and ordinances of the corporation, to be assessed, levied, and collected." *Cotter v. Doty*, 5 Ohio, 395 (1832).

<sup>1</sup> *Taylor v. Carondelet*, 22 Mo. 105

(forfeiture clause in lease); *Peachy v. Somerset*, 1 Str. 447; *Gorman v. Low*, 2 Edw. Ch. 324; *Keating v. Sparrow*, 1 Ball & Beat. 367; *State v. Railroad Co.*, 3 How. (U. S.) 534.

<sup>2</sup> *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253 (1831); *New Orleans v. Costello*, 14 La. An. 37; *Burlington v. Keller*, 18 Iowa, 59; *London v. Wood*, 12 Mod. 686; *Bab v. Clerk*, F. Moore, 411; *Clarke's Case*, 5 Co. 64; 1 Roll. Abr. 364; *Com. Dig. By-Law*, E. 1; *Chilton v. Railway Co.*, 16 M. & W. 212; *King v. Merchant Taylors' Co.*, 2 Lev. 200.

<sup>3</sup> *Burnett, In re*, 30 Ala. 461 (1857). Charter power to punish violations of ordinances "by fines, imprisonment, labor, or other penalty prescribed by ordinance" will authorize the city council to prescribe as punishment either fine or imprisonment (not both), and not even imprisonment as means of enforcing payment of a fine. *Brieswick v. Brunswick*, 51 Ga. 639 (1874); *s. c.* 21 Am. Rep. 240. Fines for the violation of ordinances, held, under special charter provisions, collectible by commitment of the persons, or by *feri facias*. *Huddleson v. Ruffin*, 6 Ohio St. 604. The power to punish offenders by fine or imprisonment, conferred upon a

*On whom Ordinances are binding, and who must notice them.*

§ 354 (288). **Who bound.** — In England the by-laws of a municipal corporation bind not only the members, but, if they are general in their nature and purposes, and not limited to any particular class or description, but intended to extend to all persons coming within the local jurisdiction of the corporation, *they bind all*, whether members or strangers, and *all must take notice of them* at their peril. And by-laws made by a municipal corporation with respect to a liberty or franchise granted them, with local jurisdiction beyond the limits of the municipality, are as binding upon persons going into the liberty, as the by-laws of the city upon those who come within its walls.<sup>1</sup>

§ 355 (289). **Same subject.** — So, also, *in this country* it is settled that valid ordinances bind not only the inhabitants of the corporation, but also strangers or non-residents coming within its limits. These, for the time being, are regarded as inhabitants, and liable in the same manner for violations of ordinances.<sup>2</sup> So far is plain. But suppose

municipal corporation, does not include the authority to coerce the payment of a fine by imprisonment. *Briswick v. Brunswick*, 51 Ga. 639 (1874). Where an ordinance provided that a convicted person should forfeit a sum "not exceeding five hundred dollars, and may be imprisoned not exceeding sixty days, or both," a sentence to pay a fine of one hundred dollars or perform sixty days' work on the public streets, was held to be void, the latter clause being unauthorized by the ordinance, and the whole sentence being uncertain and in the alternative. *Ex parte Martini*, 23 Fla. 343 (1887). Authority to enforce penalties for violations of ordinances by "*distress and sale*" of property must be expressly or plainly granted. *White v. Tallman*, 2 Dutch. (N. J.) 67 (1856); *Bergen v. Clarkson*, 1 Halst. (N. J.) 352. A law authorizing a municipal corporation to recover a fine for breach of a police regulation does not, without express provision therefor, authorize the arrest and criminal prosecution of the offender. *State v. Ruff*, 30 La. An. 497. And in England, likewise, such a power cannot be conferred by the crown, and can only exist by authority of parliament or a special custom. *Clerk v. Tucket*, 3 Lev.

281; s. c. 2 Vent. 183; *Lee v. Wallis*, 1 Kenyon, 295; *Sayer*, 263; *Adley v. Reeves*, 2 Maule & Sel. 60; *Willc.* 179; *Glover*, 311. Verbal order of police magistrate will not justify police officer in holding a person in custody for the non-payment of a fine imposed for the breach of a municipal ordinance. *Board of Trustees v. Schroeder*, 58 Illinois, 353 (1871).

<sup>1</sup> *Wille.* 105, 107; *Glover*, 289, 290; *London v. Vanacre*, 1 Ld. Raym. 498; *Salk.* 143; *Pierce v. Bartrum*, Cowp. 270; *Fazakerly v. Wiltshire*, 1 Stra. 462; *Kirk v. Nowill*, 1 Term R. 118; *Butchers' Co. v. Morey*, 1 H. Bl. 370. Do not bind beyond limits of authorized jurisdiction. See 3 Mod. 158; *T. Jones*, 144; 2 Brownl. 177; *Hob.* 211; *Hutt.* 6; 11 Rep. 53; *Godb.* 252. An ordinance passed in 1834, prohibiting the erection of "stables, &c., in the interior of the city of New Orleans, or any of its incorporated suburbs," held not to extend to the city of Lafayette, subsequently added, by act of the legislature, to the city of New Orleans. *New Orleans v. Anderson*, 9 La. An. 323 (1854).

<sup>2</sup> *Heland v. Lowell*, 3 Allen (Mass.), 407 (1862); *Whitfield v. Longest*, 6 Ire.

a person living without the limits of the corporation suffers his cattle or property to stray into it and violate its ordinances. Here two questions may arise: 1. Can such property, being *within* the corporation, be dealt with the same as if it belonged to an inhabitant of the corporation? It is held that it can.<sup>1</sup> 2. Can such *non-resident* owner be made amenable *personally* to a penalty to the corporation? In other words, has a corporation power, unless expressly conferred, to provide for collecting a penalty from a non-resident who suffers his property to violate an ordinance, but who himself was at the time without the corporate limits? This remains, perhaps, to be settled; though it is certain that ordinances will not be construed to extend to persons living without the corporation and not being within it, unless such an intention plainly appears.<sup>2</sup>

(Law) 268 (1846); approving *Pierce v. Bartram*, Cowp. 269. See also *Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *Comm'rs of Wilmington v. Roby*, 8 Ire. (Law) 250; *Comm'rs of Plymouth v. Pettijohn*, 4 Dev. (Law) 591; *Strauss v. Pontiac*, 40 Ill. 301 (1866); *City Council v. Pepper*, 1 Rich. (S. C.) Law, 364 (1845); *City Council v. King*, 4 McCord (S. C.), 487; *Marietta v. Fearing*, 4 Ohio, 427 (1831); *Dodge v. Gridley*, 10 Ohio, 173; *Horney v. Sloan*, 1 Smith (Ind.), 136; *Kennedy v. Sowden*, 1 McMullan (S. C.), 323; *Bott v. Pratt*, 33 Minn. 323; *Knoxville v. King*, 7 Lea, 441. Taxation of non-residents using streets. *Post*, sec. 682, note.

<sup>1</sup> *Whitfield v. Longest*, 6 Ire. (Law) 268 (1846); *Gosselink v. Campbell*, 4 Iowa, 296, 300 (1856); *Reed v. People*, 1 Park. Cr. Rep. 481; *Rose v. Hardie*, 98 N. C. 44. *Supra*, sec. 348, note. The point was also ruled the same way in *Spitler v. Young*, 63 Mo. 42 (1876); but the ordinance was construed not to apply to a case where the hogs owned outside of the corporation escaped from a pen in consequence of a flood, over which the owner had no control, which washed the pen away, and where the owner was using diligence to reclaim them. *Wagner, J.*, says, "While the hogs in this case were found in the streets, yet they were not there within the meaning and spirit of the ordinance, which was designed to prohibit hogs from running at large in the ordinary sense."

<sup>2</sup> *Plymouth v. Pettijohn*, 4 Dev. (Law) 591. Inability to punish non-resident owner criminally in respect to property within corporate limits, see *Reed v. People*, 1 Park. Cr. Rep. 481. Power "to make such prudential rules and regulations as may seem necessary for the better improving of the common lands of a town," &c., extends only to regulations as between those who have the right to enjoy them in common, but does not confer the power of imposing a penalty for trespasses by strangers; for such acts the town must pursue its common-law remedy. *Foster v. Rhoads*, 19 Johns. (N. Y.) 191 (1821). See, also, *People v. Works*, 7 Wend. (N. Y.) 486; *Holladay v. Marsh*, 3 Wend. (N. Y.) 142. City held not to have power to require a license tax from non-resident owners of wagons engaged in hauling into and out of the city for hire. *St. Charles v. Nolle*, 51 Mo. 122 (1872). See Index, *Vehicles*. Ordinances cannot have an *extra-territorial* effect, unless the power be plainly conferred upon the corporation. *Strauss v. Pontiac* (liquor ordinance), 40 Ill. 301 (1866); *Gosselink v. Campbell*, 4 Iowa, 296; *Robb v. Indianapolis*, 38 Ind. 49 (1871); *Chicago Packing Co. v. Chicago*, 88 Ill. 221 (1878). Whether a party *resides within the limits* embraced by an ordinance is a question of fact. *Board v. Pooley*, 11 La. An. 743; *Police Jury v. Villaviabo*, 12 La. An. 788; *New Orleans v. Boudro*, 14 La. An. 303.

§ 356 (290). **Notice.** — All persons upon whom ordinances are binding *are bound to take notice* of them.<sup>1</sup> But where a party is liable to a penalty if he does not do a given act upon notice, a newspaper notice is not sufficient, unless that mode is pointed out by the law, or general power is given to the corporation embracing within it the authority to prescribe the kind and manner of notice.<sup>2</sup>

*Ordinances relating to the Licensing, Regulation, and Taxing of Amusements and Occupations, including the Sale of Intoxicating Liquors.*

§ 357 (291). **Nature of License Power.** — Charters not unfrequently confer upon the corporation the power "to license and regulate" or to "license, regulate, and tax" certain avocations and employments, and to "tax and restrain" or "prohibit" exhibitions, shows, places of amusement, and the like; and unless there is some specific limitation on the authority of the legislature in this respect, such provisions are constitutional.<sup>3</sup> Where, by the charter of a city,

<sup>1</sup> *Palmyra v. Morton* (sidewalk ordinance), 25 Mo. 593 (1860); *Buffalo v. Webster*, 10 Wend. (N. Y.) 99 (1833). See *Reed v. People*, 1 Park. Cr. Rep. 481; *City of London v. Vanacre*, 12 Mod. 270, 272; *Glover on Corp.* 207, 290; *Knoxville v. King*, 7 Lea (Tenn.), 441 (citing text); *Faribault v. Wilson*, 34 Minn. 254 (as all persons within the city limits are bound to take notice of the ordinances, a complaint setting forth a violation of an ordinance need not recite it, — a reference to its number is sufficient). *Infra*, sec. 413. Where a city having an ordinance prohibiting the storage of fertilizers within the corporate limits, allowed, without objection or warning, a railroad company to erect expensive storehouses to accommodate its traffic in such merchandise, it was held that the city was estopped from asserting its ordinance against the company; and that the railroad, being bound to deliver its freight in the city, was not included in the terms of the ordinance. *Mayor of Athens v. Georgia R. R.*, 72 Ga. 800. As to estoppel see also *Atlanta v. Gate City Gas-Light Co.*, 71 Ga. 106; *post*, secs. 606, 803.

<sup>2</sup> *Keckely v. Commissioners of Roads*, 4 McCord (S. C.), 257 (1828).

<sup>3</sup> *Mount Pleasant v. Clutch*, 6 Iowa, 546 (1858). In *Mobile v. Yuille*, 3 Ala.

137 (1841), it was determined that there was nothing in the Constitution of the State which would invalidate a grant of power to a municipal corporation "to license bakers, and regulate the weight and price of bread, and to prohibit the baking, for sale, except by those licensed." Such a grant of power does not unlawfully interfere with the right of citizens to pursue their lawful occupations. In the City of Boston *v. Schaffer*, 9 Pick. (Mass.) 415 (1830), it was decided that it is competent for the legislature to grant a city or town power to require the payment of money as the condition of exercising particular employments, *e. g.* giving theatrical or other exhibitions. This is not in the nature of a tax, which must be general, but of an excise on special vocations. Approved, *Cincinnati v. Bryson*, 15 Ohio 625; *New Orleans v. Turpin* (auctioneers), 13 La. An. 56 (1858); *Municipality v. Dubois* (livery-stable keeper), 10 La. An. 56; *Charity Hospital v. Stickney*, 2 La. An. 550; *Slaughter v. Commonwealth*, 13 Gratt. (Va.) 767; *Carroll v. Tuscaloosa*, 12 Ala. 173; *Merriam v. New Orleans*, 14 La. An. 318; *Wynne v. Wright*, 1 Dev. & B. (N. C.) Law, 19; *Savannah v. Hartridge*, 8 Ga. 23; *Cincinnati v. Bryson*, 15 Ohio, 625, dissenting opinion of *Burchard, J.*; *Collins v. Louisville*, 2 B.

the power to license a particular occupation within its limits is given to the common council, such power involves the necessity of determining with reasonable certainty both the extent and duration of the license and the sum to be paid therefor; and must be exercised by the common council, and cannot be delegated by it, in whole or in part, to any person or authority.<sup>1</sup> Concerning *useful trades and employments*, a distinction is to be observed between the power to "license" and the power to "tax." In such cases the former right, unless such appears to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged.<sup>2</sup> Respecting

Mon. (Ky.) 134; *The Germania v. State*, 7 Md. 1; *Lucas v. Lott*, Comm'rs, 11 Gill & Johns. (Md.) 506; *Sears v. West*, 1 Murph. (N. C.) 291; *People v. Thurber*, 13 Ill. 557; *Savannah v. Charlton*, 36 Ga. 460 (1867). Forbidding driving of carts without license. Who are cartmen? *Brooklyn v. Breslin*, 57 N. Y. 591 (1874); *post*, secs. 785, 791; *East St. Louis v. Trustees*, 102 Ill. 489; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560 (the Illinois Constitution of 1870 did not affect the power of the legislature in regard to conferring the right upon cities to require licenses); *State v. Hayne*, 4 S. C. 403; *State v. Columbia*, 6 S. C. 1; *Charleston v. Oliver*, 16 S. C. 47; *United States Distilling Co. v. Chicago*, 112 Ill. 19 (brewers and distillers); *Information against Oliver*, 21 S. C. 313; *Van Hook v. Selma*, 70 Ala. 361; *People v. Mulholland*, 82 N. Y. 324 (delivering milk from vehicles). A power to "levy a license tax" is discretionary and not mandatory. Under it a city may abstain from taxing any occupation. *New Orleans v. Mülé*, 38 La. An. 826; see chapter on Taxation, *post*; *ante*, sec. 115; *Kniper v. Louisville*, 7 Bush (Ky.), 599.

The cases show some diversity of opinion as to the right to tax particular employments as distinguished from property; but the correct view, it is submitted, is this: Unless specially restrained by the Constitution, the legislature may provide for the taxing of any occupation or trade, and may confer this power upon municipal corporations. But such taxes are apt to be inequitable, and the principle not free from danger of great abuse. Hence

ordinances of this character ought not to be sustained, unless the authority be expressly or otherwise unequivocally conferred. *Newton v. Atchison*, 31 Kan. 151 (quoting the foregoing with approval). In this case a license tax upon merchants, graduated according to their average stock on hand, was held valid, and not in any illegal sense double taxation. In *Tulloss v. Sedan*, 31 Kan. 165, the same court held a license tax upon druggists, which was much larger for those not having permits to sell liquors than for those having such permits, was not illegal or void.

<sup>1</sup> *Darling v. St. Paul*, 19 Minn. 389 (1872). Compare this case, however, with *Decorah v. Dunstan*, 38 Iowa, 96 (1874), in which it was held that where an incorporated town had the power to regulate and license auction sales, &c., and to pass all ordinances necessary to exercise that power, an ordinance authorizing the mayor to fix the amount of the license within a specified sum was held not to be invalid. The general doctrine on the subject of the delegation of municipal powers is elsewhere discussed; and the line drawn between duties of a ministerial and executive character which may be delegated, and legislative or discretionary powers which may not be delegated. An ordinance which required the recommendation of twelve citizens and taxpayers in the block where it was proposed to establish a laundry, before the authorities should issue a license therefor, held illegal. *In re Quong Woo*, 13 Fed. Rep. 229; *supra*, sec. 319, and note. *Ante*, sec. 96; *post*, secs. 716, 780.

<sup>2</sup> *State v. Bean*, 91 N. C. 554 (quoting



*amusements, exhibitions, &c.*, the authority of the corporation under the power to license has been regarded as greater than when the same word is employed as to trades and occupations.<sup>1</sup> Words of

text, and holding that a power to license the carrying on of trades, &c., is a *police power*, and does not confer power to use the license as a mode of raising revenue). See also *Ex parte Mirande*, 73 Cal. 365; *O'Maley v. Freeport*, 96 Pa. St. 24; *Vansant v. Harlem Stage Co.*, 59 Md. 330; *Mühlenbrinck v. Commissioners*, 42 N. J. L. 364. Compare *Flanagan v. Plainfield*, 44 N. J. L. 118; *Clark v. New Brunswick*, 43 N. J. L. 175.

A general incorporation act conferring power to license certain *enumerated* occupations is to be construed as if inhibiting the licensing of those not enumerated. *Cairo v. Bross*, 101 Ill. 475. Where a charter provided that licenses should be *proportioned to the amount of business*, an ordinance varying the amount according to the number of persons employed was held lawful. *Ex parte Sisto Li Protti*, 68 Cal. 635. One who transacts business both as a *wholesale* and *retail* merchant may be required to take out licenses in each capacity. *New Orleans v. Koen*, 38 La. An. 328.

<sup>1</sup> *Ash v. People*, 11 Mich. 347; *ante*, sec. 115; *Youngblood v. Sexton* (distinction between license and taxation), 32 Mich. 406 (1875); s. c. 20 Am. Rep. 654; *St. Paul v. Traeger*, 25 Minn. 248 (1878). Power "to exact license money" and "to regulate" the sale of liquors held not to confer power to *prohibit* the sale thereof. *Sweet v. Wabash*, 41 Ind. 7 (1872); *Freeholders v. Barber*, 2 Halst. (N. J.) 64; *Carroll v. Tuskalooza*, 12 Ala. (N. s.) 173; *Greensboro v. Mullins*, 13 Ala. (N. s.) 341; *Lucas v. Lott. Comm'rs*, 11 Gill & Johns. (Md.) 506; *City Council v. Ahrens*, 4 Strob. (S. C.) 241; *Kip v. Paterson*, 2 Dutch. (N. J.) 298; *Portland v. O'Neill*, 1 Oreg. 218; *Bennett v. Birmingham*, 31 Pa. St. 15; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562; *Day v. Green*, 4 Cush. (Mass.) 433; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Lawrenceburg v. Wuest*, 16 Ind. 337; *Cheny v. Shelbyville*, 19 Ind. 84; *Leavenworth v. Booth* (construing words "license tax"), 15 Kan.

627 (1875); *Welch v. Hotchkiss* (building license fee of fifty cents sustained), 39 Conn. 140 (1872); s. c. 12 Am. Rep. 383; *post*, sec. 405, note. *St. Paul v. Traeger*, 25 Minn. 248, approving text; *Bennett v. People*, 30 Ill. 389; *East St. Louis v. Wehrung*, 46 Ill. 392; *Savannah v. Charlton*, 36 Ga. 460; *Darling v. St. Paul*, 19 Minn. 389 (1872), citing text; *post*, chap. xix.

Power "to regulate the sale of meat," &c., held to authorize a city to require that a license shall be obtained for the selling of meat, &c. *Kinsley v. Chicago*, 124 Ill. 359 (1888).

Distinction between *taxation* and *police regulation* well stated by *Depue, J.*, in *State v. Hoboken*, 33 N. J. L. 280 (1869); *Commonwealth v. Markham*, 7 Bush (Ky.), 486 (1870); *State v. Cassidy*, 22 Minn. 312; *post*, sec. 768; see, also, *Kip v. Patterson*, 2 Dutch. (N. J.) 298; *Mayor v. Avenue Railroad Company*, 32 N. Y. 261; 33 N. Y. 42, distinguished and questioned in *Frankford and Phila. P. R. Co. v. Philadelphia*, 58 Pa. St. 119 (1868); *Johnson v. Philadelphia*, 60 Pa. St. 445; *Freeholders v. Barber*, 2 Halst. (N. J.) 64. Difference between tax and a license to exercise particular callings upon making pecuniary compensation for the privilege. *People v. Thurber*, 13 Ill. 557; *Mount Carmel v. Wabash Co.*, 50 Ill. 69; *Kniper v. Louisville*, 7 Bush (Ky.), 599. *Smith v. City of Madison*, 7 Ind. 86 (1855), so far as it holds that authority "to suppress and restrain" bowling saloons confers the power to license and *tax* them, cannot, as it seems to us, be sustained. *Mayor, &c. v. Beasley*, 1 Humph. (Tenn.) 240, holds that power in a charter to *regulate* and *restrain* tippling-houses did not confer the power to tax them. The word "restrain" (*Emporia v. Volmer*, 12 Kan. 622, 630 (1874)) held not to be synonymous with the word "prohibit" or "suppress." Approving text. *Frank, In re*, 52 Cal. 606; *Hudson, &c. v. Hoboken*, 41 N. J. L. 71. A power "to regulate" victualling houses held to include the

this character, however, do not always have exactly the same meaning, and the intention of the legislature in using them must often be gathered from the whole charter and the general legislation of the State respecting the subject-matter.

§ 358 (292). **Same subject. Regulation of Occupations.** — In harmony with the foregoing principles, it has been held that, under authority "*to license and regulate*" draymen, &c., a municipal corporation may, by ordinance, require a license to be first taken out, and charge a reasonable sum for issuing the same and keeping the necessary record, but *cannot, by virtue of this authority, without more, levy a tax upon the occupation itself*; and, under the power to *regulate*, it may make proper police regulations as to the *mode* in which the employment shall be exercised.<sup>1</sup>

power to *license* them. *St. Johnsbury v. Thompson*, 59 Vt. 300.

One who sells his own goods at public auction, as well as one who sells another's, is an "auctioneer," allowing the common council of any municipality to require a license, &c. *Goshen v. Kern*, 63 Ind. 468. The power thus conferred on a common council is in the nature of a police regulation. *Ib.*

<sup>1</sup> *Cincinnati v. Bryson*, 15 Ohio, 625 (1846). As to correctness of application of the principle of law to the facts, *quere*. Consult, in connection with the above case, *Mays v. Cincinnati*, 1 Ohio St. 268 (1853); with which compare *Cincinnati v. Buckingham*, 10 Ohio, 261; and see cases cited *supra*, sec. 357; *Mays v. Cincinnati*, *supra*, cited by *Cornell, J.*, in *St. Paul v. Traeger*, 25 Minn. 248 (1878); *The Laundry License Case*, 22 Fed. Rep. 701; *Marmet v. State*, 45 Ohio St. 63; *Fort Smith v. Ayers*, 43 Ark. 82; *Russellville v. White*, 41 Ark. 485. An act to regulate and license the keeping of *dogs* was regarded as an exercise of the police, and not the taxing power of the State, and not to be within the constitutional provision requiring *uniformity* of taxation. *Carter v. Dow*, 16 Wis. 298 (1862); *Tenney v. Lenz*, *Ib.* 566. In the case last cited, *Paine, J.*, observes: "We cannot assent to the position that, if the sum required for a license exceeds the expense of issuing it, the act transcends the licensing power, and imposes a tax. By such a

theory the police power would be shorn of all efficiency. . . . We have no doubt, therefore, that the legislature may, in regulating any matter that is a proper subject of the police power, impose such sums for licenses as will operate as partial restrictions upon the business, or upon the keeping of the particular kinds of property regulated." See, also, *Fire Department v. Helfenstein*, 16 Wis. 136. Special constitutional provisions in reference to taxation have been held to have no reference to license taxes. *Leavenworth v. Booth*, 15 Kan. 627, 635, 636 (1875); *Anderson v. Kerns Drain. Co.*, 14 Ind. 201; *Bright v. McCullough*, 27 Ind. 223, 232; *People v. Coleman*, 4 Cal. 46.

The law recognizes property in dogs, and a city ordinance requiring the owner of such property to obtain a license to keep the same, and subjecting him to arrest, fine and imprisonment, for not procuring such license, is invalid. *Washington v. Meigs*, 1 McArthur, 53; *Harrington v. Miles*, 11 Kan. 480. See, on this general subject, *State v. Cymis*, 26 Ohio St. 400; *Ward v. State*, 48 Ala. 161; *post*, sec. 768; *ante*, sec. 141.

The legislature may, for police purposes, prescribe the limits of municipal bodies, enlarging or contracting them at pleasure, and give them power to pass ordinances to *prevent nuisances beyond their boundaries*. Thus a packing house which has been licensed by the town where it is located, but within one mile of the corpo-

§ 359 (293). **Same subject.** — So authority to a city to adopt rules and orders "for the *due regulation* of omnibuses, stages, &c.," was held not to authorize the adoption of an ordinance *requiring the payment of a tax or duty on each carriage licensed*, varying from one to twenty dollars, according to the different kinds of carriages, and the stands occupied. This was regarded as a direct tax upon the vehicle used, or its owner, and not necessary to secure the objects of the above grant of power to the city.<sup>1</sup> So where, under an act

rate limits of a city, does not exempt the same from an ordinance of that city requiring it to be licensed by that municipality. The person using the establishment is liable to be charged a license by both the town and city. *Chicago Packing Co. v. Chicago*, 88 Ill. 221.

In *Ash v. People*, 11 Mich. 347 (1863), it appeared that, by its charter, authority was given to a city to erect, establish, and regulate markets and market-places, and to license and regulate butchers and shop-keepers at any *other* place in the city, for the sale of meats, &c., and to authorize the mayor to grant such licenses and to prescribe the *sum* of money to be paid into the treasury of the city therefor. An ordinance prohibiting the keeping of meat-shops outside of the public markets without a license, and requiring the payment of a license fee of five dollars, was sustained, although the amount exceeded the expense of making and registering the license. The court denied that the fee demanded was a *tax*, and regarded it as but a reasonable compensation for the additional expense of municipal supervision over the business at the place licensed.

A *ferry license fee* of fifty dollars was held not to be a *tax*, within the meaning of the term, as used in the Constitution of *Michigan* and the charter of the city of *Detroit*. *Chilvers v. People*, 11 Mich. 43 (1862); *ante*, sec. 115. "The power to license and regulate carries with it the right to require the payment of a [reasonable] sum in consideration of the license." *Per Wright, J.*, in *State v. Herod*, 29 Iowa, 123 (1870). Whenever a municipal corporation is authorized to make by-laws relative to a given subject, and to require of those who desire to do any act or transact any business pertaining thereto to obtain a license therefor, the reasonable

cost of granting such licenses may be properly charged to the persons procuring them, although the power to do so is not expressly given in the charter. *Welch v. Hotchkiss*, 39 Conn. 140 (1872). Under a power to "license, tax, regulate, suppress, and prohibit *hawkers, peddlers, pawnbrokers*," &c., a city may grant licenses imposing such conditions and burdens as it sees fit. *Lauder v. Chicago*, 111 Ill. 291. In *Illinois* the legislature is not restricted to immoral or injurious occupations in authorizing a city to impose license fees, nor is a power to suppress any business necessary in order to warrant the exercise of a power to license. *Braun v. Chicago*, 110 Ill. 187; *post*, secs. 405, note, 768.

<sup>1</sup> *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 572 (1848); distinguished from *Boston v. Schaffer*, 9 Pick. (Mass.) 415, as to licenses for theatrical exhibitions. Power to the city council of *Charleston* to make, *inter alia*, "such ordinances respecting streets, carriages, wagons, carts, drays, &c., as to them shall seem expedient and necessary," was held to authorize an ordinance requiring all persons who drive for hire any cart, dray, wagon, or omnibus, within the city, to take out a license, and to require the vehicle to be numbered, or on failure to do so to pay a fine. *City Council v. Pepper*, 1 Rich. (S. C.) Law, 364 (1845). A street-sprinkling cart is a "public vehicle" on which a license tax is properly imposed. *St. Louis v. Woodruff*, 4 Mo. App. 169. A similar ordinance, imposing annual charge on each car of a street-railway company, was sustained as a police regulation. *Frankford Railway Company v. Philadelphia*, 58 Pa. St. 119 (1868); *s. p.* *Johnson v. Philadelphia*, 69 Pa. St. 445; and *Allerton v. Chicago*, 6 Fed. Rep. 555.

authorizing the trustees of a village corporation to make ordinances "in relation to hucksters, and for the good government of the village," it was held that an ordinance was unauthorized which required that hucksters should, before exercising their employment, take a license, and be taxed a sum varying from five to thirty dollars.<sup>1</sup>

§ 360 (294). **Same subject.** — On the other hand, the power to "license, regulate, and restrain amusements," it was admitted or taken for granted, would authorize an ordinance taxing, or requiring exhibitors to pay a specific sum for the privilege, this being considered as a means of regulating and restraining them.<sup>2</sup> So a grant of power to a city or town to license exhibitions "on such terms

A municipal corporation may under its ordinary powers of local government pass ordinances requiring a street-railway company incorporated by legislature, and having its rails down and in use through the streets under legislative sanction, to make its tracks conform to the grade, to keep in repair the space between the rails, and to remove snow and the like. But it has no power to require such a company so organized to take out a license and pay license fee as a means of taxation, unless power is given to resort to licenses and license fees for revenue purposes. A provision in the charter, granting power "to license and regulate," does not authorize the exaction of license fees for revenue purposes. Power to license when specially given in a charter is nevertheless a police power. The exaction of license fees for revenue purposes is the exercise of the power of taxation. The distinction between the power to license as a police regulation and the same power as a revenue measure is of the utmost importance. If granted with a view to revenue, the amount of tax, if not limited by charter, is in the discretion and judgment of the authorities; if given as a police power, it must be exercised as a means of regulation only, and cannot be used as a source of revenue. *North Hudson Railway Co. v. Hoboken*, 41 N. J. L. 71; *Mayor v. Avenue Railroad Co.*, 32 N. Y. 261. Power to license, tax, and regulate horse railroads, hackney carriages, &c., does not extend to taxation of *private vehicles* used by a merchant or manufacturer. *St. Louis v. Grove*, 46 Mo. 574 (1870). Nor

does power to license, tax, and regulate authorize the grant of an *exclusive* right to run omnibuses within the limits of the city. *Logan v. Pyne*, 43 Iowa, 524 (1876); *Snyder v. North Lawrence* (hackney coach, what is), 8 Kan. 82 (1871).

<sup>1</sup> *Dunham v. Rochester*, 5 Cow. (N. Y.) 462, 466 (1826). See further, Index, *Markets*.

Under a charter authorizing the license of wagons, &c., and requiring owners and keepers of wagons, &c., *using them in the city*, to take out a license, all hucksters, gardeners, &c., who are not residents and taxpayers of other towns, may be compelled to take out a license. *Frommer v. Richmond*, 31 Gratt. 646. A city has no right to require that persons owning vehicles for hire within its limits and who have paid their city licenses shall obtain from the city, at a certain fixed and exorbitant price, the plates which an ordinance of the city has prescribed for the convenient identification of the vehicles. Such an exaction is another license in disguise, and therefore unconstitutional. *Walker v. New Orleans*, 31 La. An. 828.

<sup>2</sup> *Hodges v. Mayor*, 2 Humph. (Tenn.) 61. See also, *Carter v. Dow*, 16 Wis. 299; *Tenney v. Lenz*, *Id.* 566. Speaking of this subject, Mr. Justice *Cooley* expresses it as his opinion that where the right to impose license fees to operate as a restriction upon the business or thing licensed can be fairly deduced from the taxing power conferred upon the corporation, it should be done, rather than to derive the right solely from the power to regulate. Const. Lim. 202, note.

and conditions as to it may seem just and reasonable," authorizes it to exact *money* for the license; it is not confined to regulating time and place, establishing police regulations, &c.<sup>1</sup>

§ 361 (295). **Right must be plainly conferred.**—Even the *right to license must be plainly conferred*, or it will not be held to exist. Thus, power to make "by-laws *relative to* hucksters, grocers, and victualling shops" does not authorize the corporation to exact a *license* from persons carrying on such business. Nor does the general power to pass prudential by-laws, not inconsistent with the laws of the State, confer the authority to demand a license.<sup>2</sup>

§ 362 (296). **Monopolies Invalid.**—The power to license and regulate a lawful and necessary business will not give the corporation the power to make contracts which *create or tend to create a monopoly*.<sup>3</sup>

<sup>1</sup> *Boston v. Schaffer*, 9 Pick. (Mass.) 415 (1830); distinguished from *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 572 (1848).

<sup>2</sup> *Dunham v. Rochester*, 5 Cowen, (N.Y.) 462 (1826); *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562 (1848); *Mays v. Cincinnati*, 1 Ohio St. 268 (1853); *Gale v. Kalamazoo* (market-house contract), 23 Mich. 344 (1871); s. c. 9 Am. Rep. 80; *St. Paul v. Traeger*, 25 Minn. 248 (1878); *St. Paul v. Stoltz*, 33 Minn. 233 (ordinance requiring license to peddlers held void). By-laws requiring a *license*, which may be so heavy as to amount to a *prohibition*, were justly considered to be in restraint of trade, which the general law favors, and in this case were adjudged void, "both for want of jurisdiction" in the corporation to pass them, and for want of "conformity to the general law." 1 Ohio St. 268. Where the charter gave the corporation the power "to license bakers, and to prohibit sales of bread except by those licensed," the court doubted whether under this, aside from the taxing power of the corporation, an ordinance could be supported which required twenty dollars to be paid by the baker for a license, although it admitted that the corporation could require a fee for issuing and registering the license. *Mayor, &c. of Mobile v. Yuille*, 3 Ala. 137 (1841). Statutory conditions precedent must be complied with

to make a license valid; and licenses are generally considered personal, ceasing with the life of the license, and not transferable without consent. *Munsell v. Temple* (grocery license), 3 Gilm. (8 Ill.) 96; *Lewis v. United States*, Morris (Iowa), 199; *Lombard v. Cheever* (ferry license), *Ib.* 473; *Brunetti v. New Orleans*, 9 La. 430. As to power to *revoke* licenses. *Towns v. Tallahassee*, 11 Fla. 130 (1866). "Junk shops," defined by O'Neill, C. J., "to be a place where odds and ends are purchased or sold," and cities are often empowered to exact a license from keepers thereof. *City Council v. Goldsmith*, 12 Rich. (S. C.) Law, 470 (1860). "Shows" defined: *McKee v. Town Council*, Rice (S. C.) Law, 24. *Licensed auctioneer* held not liable to the payment of a pawnbroker's license, under a city ordinance. *Hunt v. Philadelphia*, 35 Pa. St. 277.

<sup>3</sup> *Chicago v. Rumpff*, 45 Ill. 90 (1867). In this case, under a power granted to the city, in its charter, to *regulate and license the slaughtering of animals* within the corporate limits, the common council passed an ordinance, whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted the *exclusive right*, for a specified period, to have all such animals slaughtered at their establishment, they to be paid a specific sum for the

§ 363 (297). **Intoxicating Liquors.**—The authority of municipalities to license, tax, restrain, or prohibit the *traffic in or sale of*

privilege by all persons exercising it, and to have the option of accepting such proposition, but which was not to take effect until they executed a certain bond therein required; and it was held that this action of the corporate authorities could not be regarded as regulating or licensing the business, but was simply a conditional proposition, which, if accepted, would constitute a contract. It was also held that this contract tended to create a monopoly, and was therefore void. And the opinion was expressed that, under the charter, authority was conferred simply to pass ordinances to locate and construct, and to regulate, license, restrain, abate, or prohibit slaughtering establishments within the prescribed limits; and to that end the corporate authorities may so regulate the business as to prohibit its exercise, except in a particular place; but the spot so designated must be open to the enjoyment of all persons alike, upon the same terms and conditions. A monopoly cannot be *implied*, but must rest upon express grant. *Tuckahoe Canal Co. v. Railroad Co.*, 11 Leigh (Va.), 42, *per Tucker*, President. A city charter granting the city the right to "exercise and enjoy all the rights, immunities, powers, and privileges appertaining to a municipal corporation," and to "license, tax, and regulate hackney carriages, omnibuses," &c., does not authorize the city authorities to grant to one person the sole and exclusive right to run omnibuses in the city. *Logan v. Pyne*, 43 Iowa, 524 (1876); s. c. 22 Am. Rep. 261; *Gale v. Kalamazoo*, 23 Mich. 344 (1871); s. c. 9 Am. Rep. 80, in which the opinion of *Cooley, J.*, will be found to be highly instructive. *Monopolies* are odious to the law. A monopoly exists when the sale of any merchandise or commodity is restrained to one or to a certain number (11 Co. 86); and it has three inseparable consequents,—the increase of the price, the badness of the wares, the impoverishment of others. *Ib.* Statute of Monopolies: By statute, 21 Jac. I. *ch. iii.*, all monopolies and all commissions, grants, licenses, &c., to any person, &c., for any sale, buying, selling, making,

working, using of a thing, &c., are void. And any one grieved, &c., may have an action on the statute, and recover treble damages and double costs. So monopolies are contrary to Magna Charta. 2 Inst. 63. By statute, 38 Edw. III. a merchant may freely deal in all manner of merchandise. The statute of 21 Jac. II. does not extend to letters-patent for inventions, &c. The first part of this section is simply a declaration of the common law. Whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights of individuals or the public, the power to do so must come from plain and direct legislative enactment. *Ante*, secs. 319, 323, 325, 326. *Post*, sec. 369, as to power to preserve the Public Health, Safety and Convenience. Legal restraints in the form of regulations, may, however, be imposed upon the few for the benefit of the many. It is sometimes difficult to determine when a by-law is in restraint of trade, and when it is a mere regulation of trade. The former is illegal, the latter legal. *The following have been held to be bad, as in restraint of trade:* That no member should sell the barrel of any hand-gun, &c., ready proved, to any person of the trade not a member in London, or within four miles thereof. *The Master, &c., of Gunmakers, &c., v. Fell, Willes*, 384. No member should strike his stamp or mark on the barrel of any person not a member of the company, &c. *Ib.* That every person not being already free of the city, occupying, using, or exercising, or who shall occupy, use, or exercise the art, trade, or mystery of a butcher within the said city or its liberties, shall take upon himself the freedom of the Company of Butchers, and that if any person or persons (except such as are already free, &c.) shall use the trade of a butcher, not being free of this company, he shall pay, &c. *Harrison v. Godman*, 1 Burr. 12. So as "to persons using the occupation of music and dancing," *Robinson v. Gros-court*, 5 Mod. 104. That no person should erect any booth, for the purpose of any show or public entertainment, in any

*intoxicating liquors*, is so differently conferred, and so largely influenced by the general legislation and policy of the State on the subject, that the decisions relating to it are mostly of local application. Sometimes the State laws are manifestly intended to repeal or modify prior special charter provisions, which gave the control of the matter to the local authorities;<sup>1</sup> and at other times incorporated places have, by the course of legislation, been excepted from the general operation of the State laws, and have been allowed to license, regulate, or prohibit the traffic, as they deemed best.<sup>2</sup>

public place within the borough, without license from the mayor, which license should not be given at or for any other time than during the annual fairs, if three inhabitant householders, residing within 100 yards of the place intended to be used, should have previously memorialized the mayor to withhold such license, &c. *Elwood v. Bulloch*, 6 Q. B. 383. So where it was provided that those only to whom licenses were granted should have slaughter-houses within the city. *Nash v. McCracken, In re*, 33 Upper Can. Q. B. 181. Or that none but three persons appointed by the city should sweep for hire or gain any chimney or flue in the city. *The Queen v. Johnson*, 38 Upper Can. Q. B. 549. Prohibiting the use of canals on Sundays. *The Calder and Hebble Navigation Co. v. Pilling*, 14 M. & W. 76. Prohibiting licensed tavern-keepers from having a light in their bars. *Regina v. Belmont*, 35 Upper Can. Q. B. 298. *Harr. Munic. Manual (Canada)*, 5th ed. 313. *Criminal conspiracies in restraint of trade fully discussed*. 3 Stephen, Hist. Criminal Law, chap. xxx., pp. 202-227.

Power of the legislature to grant or authorize the granting of monopolies, or exclusive privileges, as affected by the 13th and 14th amendment to the Federal Constitution, see *Slaughter-house Cases*, 16 Wall. 36 (1872); *Barthet v. New Orleans*, 24 Fed. Rep. 563; *post*, chap. xviii., as to gas companies; *post*, sec. 385, note. An ordinance granting to a water company the exclusive right to furnish water to the inhabitants held to be void as creating a monopoly. *Brenham v. Brenham Water Co.*, 67 Tex. 542.

<sup>1</sup> *State v. Harris*, 10 Iowa, 441; *Burlington v. Kellar*, 18 Iowa, 59; *Hammond v. Haines*, 25 Md. 541. The adop-

tion of a general law regulating the sale of liquors does not estop the State from granting power to municipal corporations to further regulate the traffic by requiring licenses of retail dealers. *Wolf v. Lansing*, 53 Mich. 367.

<sup>2</sup> *Perdue v. Ellis*, 18 Ga. 586; *Trustees v. Keeting*, 4 Denio (N. Y.), 341; *Phillips v. Tecumseh*, 5 Neb. 305 (1877). Construction of charters in connection with State laws on the subject. *Town Council v. Harbers*, 6 Rich. (S. C.) Law, 96; *Id.* 404; *State v. Estabrook*, 6 Ala. 653; *West v. Greenville*, 39 Ala. 69; *Adams v. Mayor*, 29 Ga. 56; *Chastain v. Town Council*, 29 Ga. 333; *Cuthbert v. Conley*, 32 Ga. 211; *State v. Garlock*, 14 Iowa, 444; *Harris v. Intendant*, &c. 28 Ala. 577; *Robinson v. Mayor*, &c. 1 Humph. (Tenn.) 156; *Pekin v. Smelzel*, 21 Ill. 464; *State v. Plunkett*, 3 Harr. (N. J.) 5; both held consistent and able to stand together. *Byers v. Olney*, 16 Ill. 35; *Page v. State*, 11 Ala. 849; *Benefield v. Hines*, 13 La. An. 420; *Louisville v. McKean*, 18 B. Mon. (Ky.) 9; *Deitz v. Central*, 1 Col. 323 (1871); *Burckholter v. McConnellsville*, 20 Ohio St. 308; *Baldwin Co. v. Liquor Dealers*, 42 Ga. 325; *State v. Sherman*, 20 Mo. 265. A general law authorizing towns to require licenses of persons selling liquor held to be constitutional. *Moundsville v. Fountain*, 27 W. Va. 182.

A general power in a city or town charter to prohibit the sale of intoxicating liquors is sufficient to authorize the adoption of an ordinance for any partial prohibition deemed advisable. Under a section giving the exclusive power to license, prohibit or regulate in any manner they may see fit, the sale, &c., of liquors within the said city, an ordinance prohibiting the sale, &c., in less quantities

§ 364 (298). **Effect of General Laws respecting the Liquor Trade.**

— Where there are general laws of the State respecting the sale of intoxicating liquors, a public corporation, by virtue of a general power "to make all *by-laws* that may be necessary to preserve the peace, good order, and internal police" therein, is not authorized to pass an ordinance requiring a corporate license, and punishing persons who sell such liquors without being thus licensed.<sup>1</sup>

than five gallons, is valid and may be enforced. Where the power is conferred on the municipalities by the legislature it is wholly discretionary with the municipality to license and regulate, or partially or entirely to prohibit the traffic. *Gunnarsson v. Sterling*, 92 Ill. 569; *Goddard v. Jacksonville*, 15 Ill. 588; *Kettering v. Jacksonville*, 50 Ill. 39; *Pekiu v. Smelzel*, 21 Ill. 464; *Harbaugh v. Monmouth*, 74 Ill. 371; *Schwuchow v. Chicago*, 68 Ill. 444; *Baldwin v. Murphy*, 82 Ill. 485; *Byers v. Olney*, 16 Ill. 35; *Martin v. People*, 88 Ill. 390. Where the power is to "license, regulate and prohibit," the *prohibition need not be total*, but applies to any sales not licensed by law. *Dennehy v. Chicago*, 120 Ill. 627. A power to regulate places where liquors are sold held sufficient to validate an ordinance preventing the employment of women in them. *Bergman v. Cleveland*, 40 Ohio St. 651. A power "to license saloons, taverns, and eating houses" held, under the legislation applicable to the question, not to authorize licensing the sale of liquors. *Mount Pleasant v. Vansice*, 43 Mich. 361. Prohibiting by ordinance the sale of liquor on Sunday is not a violation of the constitutional provision forbidding the establishment of any religion by law. *Minden v. Silverstein*, 36 La. An. 912. A power to regulate the liquor traffic confers the power to confine it to designated parts of a city. *In re Wilson*, 32 Minn. 145.

*Liquor license fee* held not a tax, in the constitutional sense of the term, compelling uniformity of taxation. *East St. Louis v. Wehrung*, 46 Ill. 392. Special provision of charter construed not to give power to prohibit absolutely the sale of liquor in the town. *Hill v. Decatur*, 22 Ga. 203. A State law providing for the assessment of a specified tax on liquor dealers, the money raised to be devoted to

towns and cities in which the business was carried on, was held to be a tax and not a licensing of the sale, and not to be unconstitutional because unjust or unequal, nor because the municipality had no voice in the levy. *Youngblood v. Sexton*, 32 Mich. 406 (1875); s. c. 20 Am. Rep. 654.

"Licenses to sell liquors are not contracts between the State and the person licensed, giving the latter vested rights, and partaking of the nature of contracts, but are merely temporary permits to do what otherwise would be an offence, issued in the exercise of police powers, and subject to the direction of government, which may revoke them as it deems fit." *Per Day*, Ch. J., in *Columbus City v. Cutcomp*, 61 Iowa, 672, citing *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Calder v. Kurby*, 5 Gray, 597; *Commonwealth v. Brennan*, 103 Mass. 70. A municipal ordinance imposing a license upon the sale of liquor without prohibiting it, does not abridge the right of a citizen to pursue a lawful employment, within the meaning of the *Fourteenth Amendment* to the Constitution of the United States. *In re Bickerstaff*, 70 Cal. 35. The payment of a license tax upon the sale of liquor imposed by a city does not exempt the person who pays it from liability to pay a similar tax imposed by the county. *In re Lawrence*, 69 Cal. 608. In *Kansas* the power to license or authorize the sale of intoxicating liquors is not vested in the cities, but is conferred upon the probate judges. *Kansas v. Topeka*, 31 Kan. 452. See also *State v. Topeka*, 30 Kan. 653. A license tax has been held not to be a penalty but a debt, so far as relates to the application of the Statute of Limitations. *San Luis Obispo v. Hendricks*, 71 Cal. 242.

<sup>1</sup> *Commonwealth v. Turner*, 1 Cush. (Mass.) 493 (1848); *Loeb v. Attica*, 82



§ 365 (299). **Power to license Sale of Liquor under the General Welfare Clause.**—In the absence, however, of controlling general legislation, power to a city to pass “in general, *every other by-law or regulation that shall appear to the city council* requisite and necessary for the security, welfare, and convenience of the city, or for preserving the peace, order, and good government within the same,” was held to authorize an ordinance (and the same is constitutional) to prevent shopkeepers, unless licensed by the city, from keeping spirituous liquors in their shops or in any adjacent room.<sup>1</sup>

Ind. 175 ; and see notes to sec. 363, *ante*, *post*, sec. 436. The limitations on such a general power to make by-laws, discussed by *Shaw*, C. J. As to text, see *Commonwealth v. Dow*, 10 Met. (Mass.) 332 (1845). General welfare clause does not authorize a municipal corporation to pass an ordinance prohibiting the retail of intoxicating liquors, when this is repugnant to the State laws on the subject. *Barnett, In re*, 30 Ala. 461 (1857). But under a different state of general legislation, see *State v. Clark*, 8 Foster (28 N. H.), 176 (1854); *Heisembrittle v. City of Charleston*, 2 McMullan (S. C.), 233 ; *State v. Ferguson*, 33 N. H. 424 (1851) ; distinguished from and commenting on the above cases. *State v. Freeman* 38 N. H. 426, approving and following *State v. Clark*, 8 Foster (28 N. H.) 176 ; *Magowan v. Commonwealth*, 2 Met. (Ky.) 3 (1859). Where there is no legislation authorizing township officers incorporated under general laws of the State to regulate and license the sale of intoxicating liquors, or to exact a fee for such license, there is no power in the board of trustees either to pass an ordinance requiring, or to grant a license for this purpose. A provision limiting the amount that may be charged for liquor licenses by cities and towns does not give the power. They have just such powers as the law has conferred upon the board, and none other. *Walter v. Columbia City*, 61 Ind. 24 ; *Cowley v. Rushville*, 60 Ind. 327 ; *McFee v. Greenfield*, 62 Ind. 21.

*Ordinance ultra vires. License to sell liquors at retail. Subsequent ordinance restricting sale invalid.* A. obtained a license to sell liquors ; subsequently an ordinance was passed prohibiting the sale of liquor during the continuance of divine

service at any time thereafter to be held by any denomination of Christian people within the corporate limits, providing that the prohibition should cover the entire appointed time for divine worship from its commencement to its final close, and on all protracted occasions covering intermissions by day and night : Held invalid, as the element of time was not fixed by the corporate will, but left to a casual and incidental control, dependent upon the will and pleasure of the various denominations of Christian people, and ignoring all others. *Gilham v. Wells*, 21 Alb. Law Jour. 319 ; 64 Ga. 192 (1880).

<sup>1</sup> *Heisembrittle v. City Council*, 2 McMullan (S. C.) Law, 233 (1842). Followed and affirmed. *City Council v. Ahrens*, 4 Strob. (S. C.) Law, 241 (1850). See *City Council v. Baptist Church* (giving preamble to charter in question), *Id.* 306, 308. A town had exclusive authority over the sale of liquors therein, and it was held that power to “regulate, restrain, and suppress shops and places for the sale of ardent spirits by retail” amounted to an authority to forbid the sale ; for if there is a sale it must be made in some shop or place. *Clintonville v. Keeting*, 4 Denio (N. Y.), 341 (1847) ; *Thomas v. Mt. Vernon*, 9 Ohio, 290. Requiring a license tax from the owner of a saloon situated three miles from the settled portions of a city, though within its limits, held unlawful on the ground that the benefits of the parties should be reciprocal, and in this case the saloon owner received no benefits whatever from the city government. *Salt Lake City v. Wagner*, 2 Utah, 400. Construction of charter provisions holding that the sale of intoxicating liquors might be declared a nuisance by the municipal authorities. *Block v.*

A corporation whose charter contained the general welfare clause, and also specific power "to license persons to retail spirituous liquors, and to prohibit persons from selling without such license," and was, it seems, silent as to the amount which might be demanded for a license, was adjudged competent to enact an ordinance demanding \$500 as a fee for a retail license.<sup>1</sup>

Power by its charter to a city "to tax, or entirely suppress, all petty groceries," was held, in connection with other provisions of the charter expressly authorizing certain other subjects to be licensed, not to confer upon the corporation the power to grant licenses for retailing vinous liquors, and to demand a sum of money therefor.<sup>2</sup>

### *Ordinances Relating to Public Offences.*

§ 366 (300). **Distinction between Laws and By-Laws; Concurrent Prohibitions, &c.**—Statute law and by-laws are intended to

Jacksonville, 36 Ill. 301; Goddard v. Same, 15 Ill. 588; Byers v. Trustees, &c., 16 Ill. 35; Pekin v. Smelzel, 21 Ill. 464.

<sup>1</sup> Perdue v. Ellis, 19 Ga. 586 (1855). But see Burnett, *In re*, 30 Ala. 461, and compare that with Intendant v. Chandler, 6 Ala. 899. See, also, St. Louis v. Smith, 2 Mo. 113; where there was charter power to "restrain and prohibit tippling-houses," and the corporation was held entitled to impose a license fee. Power to "tax" and "restrain" sale of liquor includes power to grant licenses. Mt. Carmel v. Wabash County, 50 Ill. 69; Schweitzer v. Liberty, 82 Mo. 309; Portland v. Schmidt, 13 Oreg. 17. Where authority was conferred upon a corporation to suppress and prohibit the sale of intoxicating drinks, as well as to license the same, an ordinance which imposes a penalty for selling such drinks without license, which penalty exceeds that fixed by the general law of the Territory, is reasonable. Deitz v. Central, 1 Col. 323 (1872).

There should be no arbitrary discrimination in granting such licenses. Zanone v. Mound City, 103 Ill. 552. If the power to fix the fee is granted to the municipal corporation its discretion in fixing it cannot be reviewed by the courts. Wolf v. Lansing, 53 Mich. 367. Courts will not presume, as matter of law, that the

amount of a license tax upon selling liquor is unreasonable, oppressive or prohibitory. *In re Guerrero*, 69 Cal. 88. *Ex parte McNally*, 73 Cal. 632.

<sup>2</sup> Leonard v. Canton, 35 Miss. (6 George) 189 (1858). Power "to prohibit tippling-houses," does not authorize an ordinance prohibiting sales of beer by brewers. Strauss v. Pontiac, 40 Ill. 301 (1866). Prohibition in ordinance to sell liquors without license held not to apply to sales by manufacturers, but to retail dealers. St. Paul v. Troyer, 3 Minn. 291.

Under a law requiring a majority of citizens to petition for a license to the city council, a license granted upon a petition signed by a less number is void and affords no protection. Eureka v. Davis, 21 Kan. 578; and the mayor is not bound to sign any license so ordered. Welsford v. Weidlein, 23 Kan. 601; s. p. State v. Young, 17 Kan. 414; Ins. Co. v. State, 9 Kan. 210; Eureka v. Davis, 21 Kan. 578; Wabaunsee Co. v. Muhlenbacker, 18 Kan. 129; Bouldin v. Baltimore, 15 Md. 18. Cannot compel its issue by *mandamus*. State v. Stevens, 23 Kan. 456. Where there is no law governing the amount, it is a question of expediency, of which the city authorities are the sole judge. Goldsmith v. New Orleans, 31 La. 646.

meet different wants and exigencies, and to serve different purposes. The former, when general in its nature and operation, is intended to furnish a rule for the government of the people of the State everywhere. The latter, made by the corporation under derivative authority, are local regulations for the government of the inhabitants or the regulation of the local concerns of the incorporated place; and of course they must be void, unless specially authorized by the charter or organic act of the corporation, whenever they are repugnant to, or inconsistent with, the general law of the land. No *implied* power to pass by-laws, and no express *general* grant of the power, can authorize a by-law which conflicts with the statutes of the State, or with the general principles of the common law adopted or in force in the State.<sup>1</sup>

§ 367 (301). **Same subject.**—The laws of the State operate within the limits of municipal corporations and upon their inhabitants the same as elsewhere, unless it is otherwise clearly provided in the charter, or by some statute of the State; and unless so provided, *in case of conflict between laws and by-laws*, the latter must give way. But the State may, and as to local matters frequently does, except municipal corporations from the operation of its laws, and either provides a special law for them or authorizes them to provide special regulations for themselves; and when this is done there is no conflict. But these local laws and regulations are at all times subject to the paramount authority of the legislature. Questions of difficulty have arisen in consequence of grants of power to municipal corporations to make ordinances *respecting matters and acts already regulated by general statute*, and, if criminal in their nature, punishable under the laws of the State. Hence, the same

<sup>1</sup> *Ante*, secs. 317, 319, 320-330; see, also, *post*, sec. 429 *et seq.*, 432, *et seq.* and cases. *New Hampton v. Conroy*, 56 Iowa, 498; *Foster v. Brown*, 55 Iowa, 686; *State v. Lee*, 29 Minn. 445. An ordinance authorizing the licensing of an *occupation which is illegal and criminal* under the general law of the State is null and void. A license issued under such an ordinance is no defence against an indictment under the general law. *State v. Lindsay*, 34 Ark. 372 (keeping a gaming table).

An ordinance making that *which is a crime under the general law* an offence against the town, held to be void. *State v. Keith*, 94 N. C. 933 (resisting officer), *citing Town of Washington v. Hammond*,

76 N. C. 33; *State v. Langston*, 88 N. C. 692; *State v. Brittain*, 89 N. C. 574; *Centerville v. Miller*, 57 Iowa, 56; *People v. Brown*, 2 Utah, 462 (an ordinance creating and punishing the offence of assault and battery declared void). But see *Ex parte Douglass*, 1 Utah, 108, where an ordinance to punish persons keeping a house for gaming purposes was held to be authorized by the charter of Salt Lake City, though the offence was punishable by the general law of the State. In *Indiana* a statute forbidding towns to punish offences which are provided for by general law, is held constitutional. *Jett v. Richmond*, 78 Ind. 816; *Indianapolis v. Huegle*, 18 N. E. Rep. 172.

act comes to be forbidden by general statute and by the ordinance of a municipal corporation, each providing a separate and different punishment. The same transaction may, if complex in its nature, be in one part of it an offence against the general law, and in another against the by-law; but such cases present no difficulty. But can the same act be twice punished, once under the ordinance and once under the statute? The cases on this subject cannot be reconciled. Some hold that the same act may be a double offence, one against the State and one against the corporation. Others regard the act as constituting a single offence, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction.

§ 368 (302). **Author's Conclusions.** — In view of the somewhat strict construction of grants of corporate powers, elsewhere explained and illustrated, and of the subordinate nature and purposes of by-laws, the following rules, although seeming to rest on sound principles, are, in view of the decisions, stated with some distrust of their entire correctness: I. A general grant of power, such as mere authority to make by-laws, or authority to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act — for example, an assault and battery — which is made punishable as a criminal offence by the laws of the State.<sup>1</sup> The intention of the State that the general laws shall not extend to the inhabitants of municipal corporations, or that these corporations shall have the power, by ordinance, to supersede the State law, will not be inferred from grants of power general in their character; nor will such authority in the corporation be held to exist as an implied or incidental right. II. Where the act is, in its nature, one which constitutes two offences, one against the State and one against the municipal government, the latter may be constitutionally authorized to punish it, though it be also an offence under the State law; but the legislative intention that this may be done ought to be manifest and unmistakable, or the power in the corporation should be held not to exist. III. Where the act or matter covered by the charter or ordinance, and by the State law, is not essentially criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further,

<sup>1</sup> Text approved *State v. Langston*, 88 N. C. 692.

and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties, and fully provided for by the general laws. Such are the general principles to be extracted from the authorities, but the exact state of the law will more satisfactorily appear, and indeed, can only be seen, by reference to the adjudicated cases; accordingly, the leading cases upon the subject are stated in the note,<sup>1</sup> and in some of

<sup>1</sup> Smith, *In re*, Hempst. 201 (1832); Mayor, &c. of Savannah v. Hussey, 21 Ga. 80 (1857); Brownville v. Cook, 4 Neb. 101 (1875); St. Charles v. Meyer, 58 Mo. 86 (1874); New Orleans v. Miller, 7 La. An. 651 (1852); Municipality v. Wilson, 5 La. An. 747; State v. Cowan, 29 Mo. 330 (furious driving); St. Louis v. Cafferata, 24 Mo. 94 (Sunday ordinances); Amboy v. Sleeper, 31 Ill. 499; State v. Ledford, 3 Mo. 102; Independence v. Moore, 32 Mo. 392; McLaughlin v. Stephens, 2 Cranch C. C. 148; St. Louis v. Bentz, 11 Mo. 61 (ordinance against vagrants); United States v. Holly, 3 Cranch C. R. 656; Jefferson City v. Courtmire, 9 Mo. 693 (ordinance against riots); Davis v. State, 4 Stew. & Port. (Ala.), 83; State v. Plunkett, 3 Harrison (N. J.), 5 (1840); Rice v. State, 3 Kan. 141 (1865); Rogers v. Jones, 1 Wend. (N. Y.), 261; Mayor, &c. of New York v. Hyatt, 3 E. D. Smith (N. Y.), 156; Borough of York v. Forscht, 23 Pa. St. 391; March v. Commonwealth, 12 B. Mon. (Ky.) 25; Commissioners v. Harris, 7 Jones (Law), 281; Brooklyn v. Toynbee, 31 Barb. (N. Y.) 282; Davenport v. Bird, 34 Iowa, 524 (1872); Zylstra v. Charleston, 1 Bay (S. C.), 382; Petersburg v. Metzker, 21 Ill. 205 (1859); Howe v. Treasurer of Plainfield, 37 N. J. L. 145; Barter v. Commonwealth, 3 Pa. 253; State v. Clark, 1 Dutch. (N. J.) 54; State v. Pollard, 6 R. I. 290; People v. Jackson, 8 Mich. 110; *post*, sec. 376 n.; sec. 411; State v. Topeka, 36 Kans. 76; *In re* Sic, 73 Cal. 142, approving text; *Ex parte* Bourgeois, 60 Miss. 663.

Treating of the constitutional question involved, Mr. Justice Cooley remarks that, although the decisions are not uniform, the clear weight of authority is, "that the same act may constitute an offence both against the State and the municipal

corporation, and both may punish it without violation of any constitutional principle." Const. Lim. 199; s. p. March v. Commonwealth, 12 B. Mon. (Ky.) 25, 29, *per* Simpson, C. J.; Howe v. Plainfield, *supra*; Brownville v. Cook, 4 Neb. 101 (1875). In England a by-law imposing a penalty on a corporator for refusing to serve in a corporate office, is valid, notwithstanding the party may be indicted for the same refusal, as he may be in all cases of municipal offices necessary or proper to carry on the government of the corporation. Grant on Corp. 82. A distinction was there early made between grave offences classified as *pleas* of the crown, and triable upon an issue of not guilty between the king and the defendant, and lesser or petty offences punishable by fine or amercement upon *presentment* in court leet, or inferior jurisdictions. See Hale, P. C., Vol. I. ch. lii.; Vol. II. ch. xix.; Norton's Com. London, 370, 453.

The history of *Courts of Summary Jurisdiction* in England, and an outline of their jurisdiction under the Summary Jurisdiction Act of 1879, will be found in Mr. Justice Stephen's *History of Criminal Law*, Vol. I., ch. iv. *Post*, secs. 428, 432, 433.

In Georgia the *general welfare clause* in a charter was decided not to authorize the passage of an ordinance prescribing a different mode of trial and punishment in addition to that provided for by the general criminal code of the State, for harboring and enticing seamen. Savannah v. Hussey, 21 Ga. 80 (1857). The power of municipal corporations to legislate respecting offences fully covered by the State law is denied, and the general subject is largely and satisfactorily discussed; and it is well remarked that, in such cases, "the law of the State is the law of

its aspects the matter is further considered in the chapter on Municipal Courts.

the corporation; and they cannot make another law for themselves." The following is extracted from the opinion delivered by a very able judge: "Under the general grant of power [to pass all such ordinances as may seem necessary for the security, welfare, &c., of the city] the city authorities may cover all [proper] cases not provided for by the paramount authorities of the State. All those ordinances regulating cemeteries, commons, markets, vehicles, fires, exhibitions, lamps, licenses, water-works, watch, police, city taxes, city officers, health, nuisances, &c., are legitimate and proper. Nay, I might go further, and concede that where a State law defines an offence generally, and prescribes a punishment, without reference to the place where it is committed, in town or country, and the act, when committed in the streets and public places of the city, would be attended with circumstances of aggravation, such as an affray, for instance, the corporate authorities, with a view to suppress this special mischief, might probably provide against it by ordinance. And this is going quite far enough." But I deny that "a municipal corporation can legislate *criminaliter* upon a case fully covered by the State law, though aware that decisions may be found to support" that view. *Per Lumpkin, J.*, in *Savannah v. Hussey*, 21 Ga. 80, 86 (1857). And it is settled in *Georgia*, that where an act amounts to an indictable offence it cannot be punished under municipal ordinances, but the offender must be bound over to the proper court; if it does not amount to an indictable offence, the offender may be punished under the ordinances of the municipality, and if it is a nuisance, steps may also be taken to have it abated. *Vason v. Augusta*, 38 Ga. 542 (1868); *Reich v. State*, 53 Ga. 73 (1874).

But in *Alabama* it is held that a municipal corporation with power to enact ordinances "for the good government of the place, not contravening the laws of the State," may pass an ordinance imposing a fine for an assault and battery within its limits, and a punishment under the State

law for the same act is no bar to a prosecution under the ordinance. *Collier, C. J.*, delivering the opinion of the court, says: "The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish an offence against the criminal justice of the country, but to provide a mere *police regulation* for the enforcement of good order and quiet within the limits of the corporation. . . . The offences against the corporation and the State are distinguishable and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis: the one contemplates the observance of the peace and good order of the city; the other has a more enlarged object in view, — the maintenance of the peace and dignity of the State." *Mayor, &c. of Mobile v. Allaire*, 14 Ala. 400 (1848). If the principle stated in the text be correct, the soundness of this decision under the powers conferred upon the corporation may admit of doubt, but the same view had been previously taken in the same court in *The Mayor, &c. of Mobile v. Rouse* (liquor law), 8 Ala. 515 (1845); and see *Moore v. State*, 16 Ala. 411; *Greensboro v. Mullins*, 13 Ala. 341. *Post*, secs. 407, 428, 432, 433.

In *Texas* it is held that an offence committed against the proper police regulations of a municipal corporation, which at the same time violates the penal laws, can legally be prosecuted under either, and a prosecution under one will be no bar to a legal prosecution under the other. *Hamilton v. State*, 3 Tex. App. 643 (1878). *Extent of police power.* *Shafer v. Mumma*, 17 Md. 331; *ante*, secs. 141, 144, 357, 358. In *Ohio* an ordinance prohibiting singing, speech-making, &c., in the streets was held valid. *Trimble v. Bucyrus*, 3 Bates Ohio St. Dig. 419; 21 Alb. Law Jour. 176. See on this point *ante*, sec. 319. *Re Frazee*, 63 Mich. 396; *People v. Rochester*, 51 N. Y. Sup. Ct. (44 Hun) 166.

Authority to pass ordinances "to preserve the health and comfort of the town" does not empower the corporation to pass an ordinance to prevent or punish breaches of the peace. *Raleigh v. Dougherty*, 3

*Ordinances relating to the Public Health, Safety, and Convenience.*

§ 369 (303). **Health Ordinances; Hospitals and Burials.**—Our municipal corporations are usually invested *with express power to*

Humph. (Tenn.) 11 (1842); see chapter on Municipal Courts, *post*.

Where *gambling and the keeping of gambling-houses are made public offences* by the State laws, offenders may be prosecuted in the State courts for the violation of these laws, notwithstanding the organic acts of cities may give to the city council power "to restrain, prohibit, and suppress games and gambling-houses." In thus holding, the court adds, "It is not necessary, in this case, to decide whether both the State and the city can punish for the same act; but we have no doubt that the one which shall first obtain jurisdiction of the person of the accused may punish to the extent of its power." *Rice v. State*, 3 Kan. 141 (1865). The same point has been decided the same way in a later case, by the Supreme Court of *Minnesota*. *State v. Crummev*, 17 Minn. 72 (1871). Gambling being punishable under the general law, a city council "invested with authority to make ordinances to secure the inhabitants against fire, against violations of the law and the public peace, to suppress riots, gambling, drunkenness, indecent and disorderly conduct, to punish lewd behavior in public places, . . . and, generally, to provide for the safety, prosperity, and good order of the city," possesses, by virtue thereof, no power to make the keeping of any gambling device a misdemeanor, and to punish the same. *Mount Pleasant v. Breeze*, 11 Iowa, 399 (1860). This case was approved *In re Lee Tong*, 18 Fed. Rep. 253. A power to suppress gambling does not include a power to license it. *Goetler v. State*, 45 Ark. 454.

Police officers in *Indiana* held to have no power to seize and destroy gambling apparatus without an ordinance being passed, but no opinion was expressed as to the validity of such an ordinance. *Ridgeway v. West*, 60 Ind. 371 (1878). Power to suppress gambling-houses. *Society of Arts, &c. v. Musgrove*, 44 Miss.

820; s. c. 7 Am. Rep. 723; *Moore v. State*, 48 Miss. 147; s. c. 12 Am. Rep. 367.

In *Missouri* it is held that where the same act (as, for example, *furious driving* in highways and public places) is a violation of a valid municipal ordinance and of the general criminal statutes of the state, the offender can be punished but once; and hence, to an indictment in the State court, he may plead a former conviction under the ordinance of the municipal corporation. *State v. Cowan*, 29 Mo. 330 (1860). But *quære*. The opinion in this case assumes, without discussion, that the offence is single. *Id.* The later, and it would seem the correct doctrine on this subject, is thus expressed by *Wagner, J.*, in *The State v. Gordon*, 60 Mo. 383, 385 (1875):—

"The legislature has the undoubted right, in reference to statutory misdemeanors, to say in what particular jurisdiction they shall be tried, and to make that jurisdiction exclusive of all others. When the power to hear and determine these minor offences is given to a municipal corporation, but no words of exclusion or restriction are used, the remedies between the State and corporation will be construed to be concurrent; but where the manifest intention is that the prosecution shall be limited exclusively to one jurisdiction, that intention must prevail."

In *State v. Wister*, 62 Mo. 592 (1876), the defendant, indicted for keeping a bawdy house, pleaded *autrefois convict*, upon a complaint before the city recorder. As the charter did not confer upon the city exclusive cognizance of this class of offences the plea was held bad, although the recorder was invested with "exclusive jurisdiction of all cases arising under any ordinance of the city." *s. p.* *State v. Harper*, 58 Mo. 531. In *State v. Gordon*, 60 Mo. 383, the charter in terms conferred exclusive jurisdiction on the municipal authorities in respect of a certain class of misdemeanors, in which was included the one in question in this case.

*preserve the health and safety of the inhabitants.* This is, indeed, one of the chief purposes of local government, and reasonable by-laws in

In *Nebraska* the doctrine is maintained that "the same act may constitute an offence against both the State and the municipal government, and both may punish it without infringing any constitutional right." *Brownville v. Cook*, 4 Neb. 101, 105 (1875), *per Lake*, C. J. In this case an ordinance was sustained punishing "wilful, malicious, and mischievous meddling with or trespasses upon property." The ordinance was more specific than the criminal code of the State on this subject, but this was not made the basis of the decision.

In *Minnesota* it is held that the legislature may authorize a city to impose new and additional penalties for acts (in this case the selling of liquors on Sunday) already made penal by the general laws of the State. *State v. Ludwig*, 21 Minn. 202. "The principle established by the weight of authority, and we think in accordance with sound reason, is that the legislature of the State may authorize a municipal government to impose new and additional remedies for acts already penal by the laws of the State. *Per McMillan*, C. J., citing *State v. Charles*, 16 Minn. 474; *Brooklyn v. Toynbee*, 31 Barb. 282; 1 Dillon on Mun. Corp. sec. 368; *Cooley Const. Lim.* p. 199, and notes 1 and 2."

In *Michigan*, in *Slaughter v. People*, 2 Doug. (Mich.) 334, the principle was decided that it was *not competent* to punish, under a city ordinance, an act which was indictable. Illustrating the difference between prosecutions, under special penal provisions of a city charter, of acts with specified fines and penalties affixed by the charter, but which acts are breaches of the law of the State wherever committed, and ordinary prosecutions under municipal ordinances, see *Wayne County v. Detroit*, 17 Mich. 390 (1868); *People v. Detroit*, 13 Mich. 445 (1869); *People v. Jackson*, 8 Mich. 110; *post*, chap. xiii.

In *Indiana* it was first held that where the act complained of is indictable as a criminal offence against the laws of the State, a person could not be punished for such act under or by virtue of the ordinances of a city. City Council of Indi-

anapolis *v. Blythe*, 2 Ind. (Carter) 75 (1850). In this case the city unsuccessfully sought to recover a penalty prescribed by ordinance for an assault and battery committed by the defendant within the city. Same principle, *City of Madison v. Hatcher*, 8 Blackf. (Ind.) 341 (1846). But these cases were overruled by *Ambrose v. State*, 6 Ind. 351, in which it was held that a single act might constitute two offences, one against the State and one against the municipal government, and "that each might punish in its own mode, by its own officers, the same act as an offence against each." *Perkins, J.*, in *Waldo v. Wallace*, 12 Ind. 582 (1859), where prior cases in that State are referred to. See, also, *Lawrenceburg v. Wuest*, 16 Ind. 337; *Fox v. State*, 5 How. 410; *Moore v. People*, 14 How. 13; *post*, sec. 432.

In *Louisiana*, municipal corporations are held to have no power to impose a penalty on that which is made punishable as a criminal offence by the laws of the State. But it is admitted that there is a class of offences against public order not made punishable by the State law, which it is within the power of such corporation to suppress. *New Orleans v. Miller*, 7 La. An. 651 (1852); *Municipality v. Wilson*, 5 La. An. 747. This case seems to concede that the city corporation cannot punish for an act identical with that punished by the State law. See, also, *Comm'r's v. Harris*, 7 Jones (Law), 281; *People v. Jackson*, 8 Mich. 110. The charter of a city authorized the common council to pass ordinances upon certain subjects pertaining to the police, good order, and welfare of the city, and provided that a violation of certain of such ordinances should be a misdemeanor, and might be prosecuted before the police court of the city like other offences, which court might inflict the penalty named in such ordinance, provided that no penalty should exceed the sum of fifty dollars for a single offence. It was held that the charter did not attempt to confer upon the common council the power to define and determine crime, and was not therefore unconstitutional.



relation thereto have always been sustained in England as within the incidental authority of corporations to ordain.<sup>1</sup> It will be useful to illustrate the subject by reference to some of the adjudged cases.<sup>2</sup> An ordinance of a city prohibiting, under a penalty, any person, not duly licensed therefor by the city authorities, from "removing or carrying through any of the streets of the city any house-dirt, refuse, offal, or filth," is not improperly in restraint of trade, and is reasonable and valid. Such a by-law is not in the nature of a monopoly, but is founded upon a wise regard for the public health. It was contended that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons, as well as they could those of licensed persons; but *practically* it was considered that the main object of the city could be better accomplished by employing men over whom they have entire control, night and day, who are at hand, and able from habit to do the work in the best way and at the proper time.<sup>3</sup>

tional. *State v. Tryon*, 39 Conn. 183 (1872).

The Constitution of *California* (art. 11, sec. 11), ordains that cities and towns may "pass and enforce within their limits such local police, sanitary, and other regulations as do not conflict with general laws." An ordinance of a city aimed at opium dens was held to be invalid because it punished precisely the same acts made punishable by the Penal Code. Text, sec. 368, quoted, and the court adds, "These rules express the law as we understand it." *Re Sic*, 73 Cal. 142 (1877). *Re Johnson*, *Id.* 228, ordinance prohibiting persons to visit, for purposes of prostitution, houses of ill-fame sustained, not being in conflict with the general law of the State. *Re Campbell* (ordinance to suppress tippling-houses sustained), 74 Cal. 20 (1877); *Lane, Ex parte*, 76 Cal. 587; *post*, sec. 436, note.

<sup>1</sup> Text approved, *Mayor of Monroe v. Gerspach*, 33 La. An. 1011.

<sup>2</sup> *Ante*, chap. vi. secs. 141, 142, 144.

<sup>3</sup> *Vandine, In re*, 6 Pick. (Mass.) 187 (1828); commented on in *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 575, 576 (1848). *Ante*, sec. 362, note. In *Zylstra v. Corporation of Charleston*, 1 Bay (S. C.), 382 (1794), Mr. Justice *Waties* (one of the most accomplished of early American judges), speaking of an ordinance prohibiting the making of soap or candles contrary to the mode prescribed and within

the limits of the city, says, "I am willing to admit that the by-law itself is a valid one. If it restrained an *inoffensive* trade it would not be so; but it is made to restrain one that is both offensive and dangerous. It is, therefore, calculated to guard the comfort and safety of the citizens; and the benefit of a by-law is, generally, the touchstone of its validity." The courts will not interfere with the legitimate exercise by municipal bodies of their police powers by which the peace, health, comfort, and general welfare are secured or promoted. *Weil v. Ricord*, 9 C. E. Green (24 N. J. Eq.), 169; *Boehm v. Baltimore*, 61 Md. 259.

"The proper control of the time and mode of cleansing such receptacles for refuse matter [sinks, cesspools, &c.], and removal of their contents, is not only a legitimate subject of municipal concern, but is imperatively demanded by a just regard for the comfort and health of the citizen." Legislation for the protection of the public health and for establishing boards of health "ought not to be regarded as detracting from the general powers of municipal governments, unless that legislative intent clearly appears." *Knapp, J. in Nicoulin v. Lowery*, 49 N. J. Law, 391. A power to "exclude from certain limits or to regulate all occupations, houses, &c., . . . which are against good morals, . . . or dangerous to the public safety," in-

§ 370 (304). **Same subject.** — Authority by charter to pass ordinances respecting the harbors and wharves, and “every other by-law necessary for the security, welfare, and convenience of the city,” gives to the city council power to pass a health ordinance requiring *boats coming from infected places* to anchor before landing and to submit to an examination, provided such ordinance be not repugnant to the general law of the State. And it was further held that a general law of the State, prohibiting “any person coming into the State from an infected place, and in violation of quarantine regulations,” was not repugnant to and did not render the ordinance invalid.<sup>1</sup>

§ 371 (305). **Hospitals.** — Authority to the corporation of New Orleans “to pass such by-laws as they shall deem necessary to maintain the cleanliness and salubrity of the city,” was considered in view of its extensive nature, certain provisions of the civil code, and the liability of the city to epidemics, as conferring power upon the city council to *prohibit the erection and maintenance of private hospitals*; the court admitting that the same question had been decided otherwise by tribunals governed by the common-law jurisprudence.<sup>2</sup>

cludes the power to confine the *keeping of more than two cows* within prescribed limits. *Re Linehan*, 72 Cal. 114.

Power to a city council to compel the *owners and occupants of slaughter-houses to cleanse and abate* them whenever necessary for the health of the inhabitants, was considered not to authorize an ordinance entirely prohibiting the slaughtering of animals within certain limits of the city. *Wreford v. People*, 14 Mich. 41 (1865); see Metropolitan Board of Health, 37 N. Y. 661; *Shrader, In re*, 33 Cal. 279 (1867). In *Cronin v. People*, 82 N. Y. 318 (1880); s. c. 22 Alb. Law J. 430, it appeared that by the charter of the city of Albany, the common council was authorized by ordinance “to regulate the erection, use, and continuance of slaughter-houses.” It was held that the power to “regulate,” as thus used, gave the council the right to determine and fix the limits and localities within which new *slaughter-houses* may be erected, and from which they may be excluded, and also to prohibit their *continuance* whenever and wherever they endanger the health and comfort of the community, of which the common council was to judge for itself, and its judgment was implied from the ordinance, and need not be recited.

Powers with respect to *privies*. *Gregory v. New York*, 40 N. Y. 273. Powers under legislative authority with respect to *swill milk*. *Johnson v. Simonton*, 43 Cal. 242 (1872). Power to regulate the *sale of milk* from vehicles by requiring a license sustained. *People v. Mulholland*, 82 N. Y. 324 (1880).

<sup>1</sup> *Dubois v. Augusta*, Dudley (Ga.), 30 (1831); *ante*, sec. 144, as to Quarantine and Health Powers of municipalities.

<sup>2</sup> *Milne v. Davidson*, 5 Martin, 409.

A power to “erect and establish . . . pest-houses and hospitals” does not authorize a city to enact an ordinance to regulate and license *private* hospitals; nor does a general power to make by-laws “necessary to carry out the objects of the corporation.” *Bessonies v. Indianapolis*, 71 Ind. 189.

As to *city* hospitals, see *Vionet v. Municipality*, 4 La. An. 42; *Bozant v. Campbell*, 9 Rob. (La.) 411; *City Council v. Boyd*, 1 Const. Rep. A. D. 1817 (S. C.), 352; *Tucker v. Virginia City*, 4 Nev. 20. Municipal corporation may found hospitals for the poor under 39 Eliz. chap. v. *Newcastle, In re*, 12 Clark & Fin. 402. Where a city has power to “establish” a hospital, the purchase, ac-

§ 372 (306). **Cemeteries and Burials.** — The public health, comfort, and convenience are concerned in *the proper regulation of burials*; and the evils resulting from its neglect are especially to be apprehended in the crowded populations of cities. Power to regulate this matter may properly be conferred upon municipal corporations. And such power will be held to be given by authority to make police regulations or to pass by-laws respecting the health, good government, and welfare of the place.<sup>1</sup> Power to city corpora-

cording to existing law, of a farm and the buildings thereon specially for the purpose is an "establishing" of the hospital. *Richmond v. Henrico County*, 83 Va. 204 (1887).

*Quarantine* ordinances of a municipal corporation, passed by virtue of a grant of power from the State, whereby passenger vessels are required to remain in quarantine for a specified period, are not repugnant to the commerce clause of the Federal Constitution. *St. Louis v. McCoy*, 18 Mo. 238 (1853); s. p. *St. Louis v. Boffinger*, 19 Mo. 13; *Metcalf v. St. Louis*, 11 Mo. 103. In modern usage, *quarantine* is not confined to vessels having on board the plague, but extends to vessels having on board other contagious diseases. *Per Tenney*, C. J., *Mitchell v. Rockland*, 41 Me. 363 (1856); s. c. again, 45 Me. 496 (1858); *ante*, sec. 144.

*Boards of health.* — An ordinance creating and giving to the board of health "general supervision over the health of the city," and "all necessary power to carry the ordinance into effect," was considered to include the power to rent a building for a temporary hospital to protect the city from an apprehended visitation of the cholera, and to make the corporation liable for the rent, although it did not become necessary to use the house. *Aull v. Lexington*, 18 Mo. 401 (1853). *Power of board of health.* *Frend v. Dennett*, 4 C. B. (N. s.) 576; *Barton v. New Orleans*, 16 La. An. 317; *Hutton v. Camden*, 39 N. J. L. 122 (1876); *Nicoulin v. Lowery*, 49 N. J. Law, 391; *Ferguson v. Selma*, 43 Ala. 398 (1869); *Tugman v. Chicago*, 78 Ill. 405 (1875); *Belcher v. Farrar*, 8 Allen (Mass.), 325; *Hazen v. Strong*, 2 Vt. 427; *Commissioners v. Powe*, 6 Jones (Law), 134; *Wilkinson v. Albany*, 8 Fost. (28 N. H.) 9. The powers of a

board of health held to be advisory and executive, not legislative, and a resolution of the board that a specified tannery was a nuisance was unauthorized and void. *State v. Trenton*, 7 Vroom (36 N. J. L.), 233. Such a board held not to have the power to absolutely prohibit carrying on a lawful business not necessarily a nuisance. *Weil v. Ricord*, 9 C. E. Green (24 N. J. Eq.), 169. Regularly the orders of a board of health, directing the abatement of a nuisance, should be *in writing*. Such orders may be proved by the minutes of the board, by the written orders themselves, or by being recited in the proceedings of the Corporation of which the board of health are members. How far *parol evidence* may be received of such orders, when it appears that no record or written evidence ever existed, is not free from doubt. *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397 (1836), where *parol evidence* of this kind was held inadmissible by the Supreme Court. But see, in Court of Errors, *Van Wormer v. Albany*, 18 Wend. (N. Y.) 169, affirming s. c. 15 Wend. 262. See also, *People v. Adams*, 9 Wend. (N. Y.) 333; 6 Wend. (N. Y.) 651; *ante*, chap. xi.; *Health Department v. Knoll*, 70 N. Y. 530 (1877).

<sup>1</sup> *Bogert v. Indianapolis*, 13 Ind. 134 (1859), *per Perkins, J.*; *Mayor, &c. of New York v. Slack*, 3 Wheel. Cr. Cas. 237 (1824); *Brick Presbyterian Church v. New York*, 5 Cow. (N. Y.) 538 (1826); *ante*, sec. 142, note; *Coates v. Same*, 7 Cow. (N. Y.) 585 (1827); *Austin v. Murray*, 16 Pick. (Mass.) 121 (1834); *Commonwealth v. Fahey*, 5 Cush. (Mass.) 408 (1850); *New Orleans v. St. Louis Church*, 11 La. An. 244 (1856); distinguished from *Brick Presbyterian Church v. New York*, *supra*; *Commonwealth v. Goodrich*, 13 Allen (Mass.), 546; *ante*, secs. 141, 142.

tion, after enumerating various objects, "*in general* to pass every *other* by-law that to it shall seem requisite and necessary for the security, welfare, and convenience of the city," &c., was, by the Court of Appeals of South Carolina, considered to give authority to regulate the burial of the dead, and particularly to prevent the establishment of new burial grounds within the limits of the city, and, in the opinion of the organ of the court, also to regulate the time of burial, the manner of interment so as to prevent noxious effluvia, and to prohibit interments in the private gardens, yards, and by-places of the city.<sup>1</sup> But as every by-law must be reasonable, an arbitrary or unnecessary or oppressive restraint upon the right of burying the dead is invalid.<sup>2</sup>

§ 373 (307.) **Same subject.** — Where the burden to support a public cemetery is required to be borne by all the citizens, an ordinance throwing that burden upon a particular class is unreasonable and void.<sup>3</sup> Cemeteries in cities are not *per se* nuisances, but special circumstances may make them so. It is not, however, sufficient that they affect the market value of property in the vicinity.<sup>4</sup> A city

The power of disinterment may be delegated by the legislature to municipalities. Kincaid's Appeal, 66 Pa. St. 411 (1870).

<sup>1</sup> City Council v. Baptist Church, 4 Strob. (S. C.) Law, 306, 309 (1850), *per Frost, J.*; s. p. Bogert v. Indianapolis, 13 Ind. 134, *per Perkins, J.*; New Orleans v. St. Louis Church, 11 La. An. 244; distinguished from 5 Cowen, 538, *supra*; Musgrove v. St. Louis Catholic Church, 10 La. An. 431.

<sup>2</sup> Austin v. Murray, 16 Pick. (Mass.) 121 (1834); Coates v. Mayor, &c. of New York, 7 Cow. (N. Y.) 585; Commonwealth v. Fahey, 5 Cush. (Mass.) 408 (1850).

The law of burials, in some of its relations to property and municipal rights, was ably considered by the Hon. Samuel B. Ruggles, referee, in the matter of the opening of Beekman Street, in New York City, whose report, establishing the following principles, was confirmed by the Supreme Court: 1. In this country, corpses and their burials are not matters of ecclesiastical cognizance. 2. That the right to bury a corpse and preserve its remains is a legal right, belonging, in the absence of testamentary disposition, exclusively to the next of kin, and includes

the right to select and change the place of sepulture at pleasure. 3. If place of burial is taken for public use the next of kin may claim indemnity for expense of removing and suitably re-interring their remains. Beekman Street, *In re*, 4 Bradf. (N. Y.) 503, 532 (1856); Bogert v. City of Indianapolis, 13 Ind. 134 (1859), *per Perkins, J.* Many cases relating to the law of cemeteries are collected in Mr. Thompson's note to Louisville v. Nevin, 19 Am. Rep. 78, 79 (1874); s. c. 10 Bush 549. See, also, Brick Presb. Church, *In re*, 3 Edw. Ch. Rep. (N. Y.) 155. Laying streets and highways through cemeteries. Cemetery Assoc. v. New Haven, 43 Conn. 234 (1875); s. c. 21 Am. Rep. 643, and note and cases cited. Trustees v. Walsh, 57 Ill. 363; s. c. 11 Am. Rep. 21. Local assessments for improvements of adjoining streets. Louisville v. Nevin, 10 Bush (Ky.), 549 (1874); s. c. 19 Am. Rep. 78. See on this point, *post*, sec. 776.

<sup>3</sup> Beroujohn v. Mobile, 27 Ala. 53 (1855).

<sup>4</sup> New Orleans v. St. Louis Church, 11 La. An. 244 (1856); Musgrove v. Same, 10 La. An. 431; Lake View v. Letz, 44 Ill. 81 (1867).

corporation had power, by charter, "to establish cemeteries or burial places within or without the city." It was held that this would authorize the city to establish cemeteries of its own, and regulate them; but that it did not empower the council to subject to the control of the city sexton cemeteries other than those belonging to the city, nor to pass an ordinance prohibiting lot owners in private cemeteries,<sup>3</sup> though within the city limits, from entering to bury without the permission of the city sexton, to be obtained only by paying him the price of digging a grave.<sup>1</sup> Certain statutes of New York, authorizing incorporated rural cemetery associations to condemn lands for cemetery purposes, where no right on the part of the public to buy lots or bury their dead there, or to fix the price of lots, is secured, were held to be unconstitutional, on the ground that the use was private and not public.<sup>2</sup>

§ 374 (308). **Nuisances, and of the Power to prevent and abate.**—It is to secure and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally endowed with *power to prevent and abate nuisances*. This authority and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extra-judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such.<sup>3</sup> Speaking upon this

<sup>1</sup> Bogert v. Indianapolis, 13 Ind. 134 (1859).

<sup>2</sup> Deansville Cemetery Association, *In re*, 66 N. Y. 569; overruling s. c. 5 Hun, 482.

<sup>3</sup> Crosby v. Warren, 1 Rich. (S. C.) 385; Roberts v. Ogle, 30 Ill. 459; Salem v. Eastern R. Co., 98 Mass. 431; Dingley v. Boston, 100 Mass. 544; Van Dyke v. Cincinnati, 1 Disney (Ohio), 532; Lake View v. Letz, 44 Ill. 81; Wreford v. People, 14 Mich. 41 (1865); State v. Jersey City, 5 Dutch. (N. J.) 170; Ward v. Little Rock, 41 Ark. 526; City of Denver v. Mullen, 7 Col. 345; McKibbin v. Fort Smith, 35 Ark. 352; Mayor of Monroe v. Gerspach, 33 La. An. 1011; St. Paul v. Gilfillan, 36 Minn. 298. The legislature may invest a municipal corporation with *power to abate nuisances summarily*, without requiring resort to legal proceedings (Baumgartner v. Hasty, 100 Ind.

575), or by a trial by jury. King v. Davenport, 98 Ill. 305; s. c. 38 Am. Reg. 89. That which is authorized by legislative authority cannot be declared a nuisance by a city corporation. Cases *supra*. The power to abate nuisances is a portion of police authority necessarily vested in the corporation of all populous towns. Kennedy v. Phelps, 10 La. An. 227, *per Buchanan, J.* A city cannot create a nuisance upon private property, as, in this case, by diverting a stream, and compel its owner to abate it. Hannibal v. Richards, 82 Mo. 330. Nuisances are of two kinds, — public or common nuisances, which affect people generally, and private nuisances, which may be defined as anything done to the hurt of the lands, tenements, or hereditaments of another. Russell on Crimes, 4th ed. 435. A public nuisance can only be abated by a public prosecution, or by a party whose damages are special,

subject in a *very important* case, where a city, under authority to prevent and restrain encroachments on rivers running through it, com-

and different from those sustained by the public generally. *School District, &c. v. Neil*, 36 Kan. 617; *Billard v. Erhart*, 35 Kan. 611; *Blanc v. Murray*, 36 La. An. 162. See also *Moore v. Langdon*, 2 Mackey, 127. A public nuisance is not made legal by having been maintained for *twenty years*. *Commonwealth v. Upton*, 6 Gray, 473; *New Salem v. Eagle Mill Co.*, 138 Mass. 8. The erection of a *building in a public street* to be used as a market, and as a pound for confining swine, would be both a public and a private nuisance, and *may be enjoined* at the suit of any one threatened with injury thereby. *Lutterloh v. Cedar Keys*, 15 Fla. 306. But see *Henkel v. Detroit*, 49 Mich. 249; Index, tit. *Injunction*. That which affects only *three or four persons* is a private and not a public nuisance. *The King v. Lloyd*, 4 Esp. 200. The term "nuisance" is well understood, and means literally annoyance, — anything that worketh hurt. *The King v. White*, 1 Burr. 333; *The King v. Davey*, 5 Esp. 217; *Burditt v. Swenson*, 17 Tex. 489.

*Offensive Trades and Occupations.* It is not necessary, to constitute a nuisance, to show that the smell, &c., produced should be unwholesome. It is enough if it renders the enjoyment of life and property uncomfortable. *Per Lord Mansfield*, in *The King v. White et al.*, 1 Burr. 337; *The King v. Neil*, 2 C. & P. 485; *St. Helen's Chemical Co. v. Corporation of St. Helen's*, L. R. 1 Ex. Div. 196. "If there be smells offensive to the senses, that is enough, as the neighborhood has a right to fresh and pure air." *Per Abbott, C. J.*, *The King v. Neil*, 2 C. & P. 485. "The only question therefore is, Is the business (slaughter-house), as carried on by the defendant, productive of smells to persons passing along the public highway?" *Id.* A by-law providing "that no person shall keep a *slaughter-house* within the city without a special resolution of the council" was held bad, tending to create a monopoly. *Nash v. McCracken, In re*, 33 Upper Can. Q. B. 181. So a by-law imposing a fine upon every person "who shall keep or suffer to be kept, any swine

within the said borough from 1st February to 31st October inclusive, in any year." *Everett v. Grapes*, 3 L. T. N. s. 669. A resolution or license from the corporation held to be no defence to a prosecution for a public nuisance. *The King v. Cross*, 2 C. & P. 483. "This certificate is no defence; and even if it were a license from all the magistrates in the county to the defendant to slaughter horses in this very place, it would not entitle the defendant to continue the business there one hour after it became a public nuisance to the neighborhood. . . . If the defendant's *slaughtering house* was so conducted as to be a public nuisance at common law, the parish might at any time have caused it to be removed; and I am clearly of opinion that in this case it was so conducted as to be a nuisance at common law, and that the defendant would not have been and is not entitled to any compensation." It was in this case proved that smells proceeded from the slaughter-house which were a great nuisance to persons passing along the public highway. If a certain noxious trade is already established in a place remote from habitation and public roads, and persons afterwards come and build houses within reach of its noxious effects, or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the persons using the road, in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the houses in the one case, and the making of the road in the other. *Per Abbott, C. J.*, in *The King v. Cross*, 2 C. & P. 484. But *quære*; and see cases *supra*. But if the man so situated increase the nuisance by the manner or extent to which he carries on the trade he is liable to indictment. *The King v. Watts, M. & M.* 281; *The King v. Neville*, 1 Peake, 92. In countries, however, where great works are carried on, which are the means of developing national wealth, persons must not stand on extreme rights. *Bamford v. Turnley*, 3 B. & S. 62-66; *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608; s. c. 11 H. L. C. 642; *Gaunt v.*

menced *summary proceeding to remove a private wharf*, an eminent judge uses this language: "But the mere declaration by the city

Fynney, L. R. 8 Ch. Ap. 8; Harrison v. Good, L. R. 11 Eq. 338; Salvin v. North Brancepeth Coal Co., L. R. 9 Ch. Ap. 705; Ball v. Ray, L. R. 8 Ch. Ap. 467; Broder v. Saillard, L. R. 2 Ch. Div. 692; Harr. Munic. Man. 5th ed. 397.

But a *private individual* cannot justify damaging the property of another on the ground that it is a public nuisance, unless it do him a special and particular injury. Dimes v. Petley, 15 Q. B. 276; Arnold v. Holbrook, L. R. 8 Q. B. 96; The Mayor, &c. of Scarborough v. Rural Sanitary Authority of Scarborough, L. R. 1 Ex. Div. 344; Price v. Grantz, 118 Pa. St. 402. A distinction must be drawn between a house which is a nuisance *per se*, and one that is only a nuisance by reason of its use or abuse. In the latter case there is no legal right to destroy the property. In several parts of England public slaughter-houses are established, under a provision that "no person shall slaughter any cattle or dress any carcass for sale as food for man in any place within the limits other than a slaughter-house." It was held that the enactment only applied to the slaughtering of beasts intended by the person slaughtering the same for sale for human food. Elias v. Nightingale, 8 E. & B. 698; see further, Anthony v. The Brecon Markets Co., L. R. 2 Ex. 167; reversed, L. R. 7 Ex. 399. An indictment will lie for a public nuisance, but not for a private nuisance. The King v. Atkins, 3 Burr. 1706. That which is not of public concern is a mere civil injury. The King v. Storr, 3 Burr. 1698; The King v. Johnson, 1 Wils. 325. The non-repair of a private road, even by a public body, is not indictable. The King v. Richards, 8 T. R. 634; The King v. Trafford, 1 B. & Ad. 874. The writ *quod permittat* lay at common law to prostrate a public nuisance (Palmer v. Poultney, 2 Salk. 458), and after judgment on an indictment for a nuisance, a writ of prostration may still be issued. The King v. Newdigate, Comb. 10; Houghton's Case, Sir T. Boyd, 215; Vin. Abr. "Nuisance," A; *Id.* "Chem-  
min," Fitz. Nat. Brev. 124; The Queen v. Haynes, 7 Ir. L. R. 2. An action on

the case will lie for the *continuance of a nuisance* after recovery for its erection. Rosewell v. Prior, 2 Salk. 460. Though an indictment for a nuisance is in form a criminal, it is in substance a civil proceeding remedial in its object. The King v. Sadler, 4 C. & P. 218; Holmes v. Wilson, 10 A. & E. 503; Douglas, *In re*, 3 Q. B. 825; Thompson v. Gibson, 7 M. & W. 456; The Queen v. Chorley, 12 Q. B. 515; The King v. Russell, 3 E. & B. 942; The Queen v. Loughton, 3 Smith, 575; The Queen v. Lincombe, 2 Chit. 214. Upon an indictment for a continuing nuisance—such as a wall across a highway—the *proper judgment is*, that it be abated (The King v. Stead, 8 T. R. 142; The King v. Yorkshire, 7 T. R. 467), and when the court is satisfied before judgment that a nuisance has been abated, the judgment need not be pronounced. The King v. Incedon, 13 East, 164; The Queen v. Paget, 3 F. & F. 29. The practice followed is to respite judgment until it be seen whether or not the nuisance is abated, and, if not, to inflict a heavy fine to compel the abatement. There may be an indictment for the continuance of a nuisance (The Queen v. Maybury, 4 F. & F. 90), and in such a case the former judgment is conclusive that the *locus in quo* was a highway, and that the erection upon it was a nuisance. This being so, upon proof of the continuance of the nuisance the jury must find the defendant guilty. See further, Regina v. Jackson, 40 Upper Can. Q. B. 290.

As to the right of an adjoining owner to recover damages for a *private injury resulting from a public nuisance* in a public highway, where there is a direct and particular damage, such as that arising from unreasonable obstruction to the access to his premises from the highway. Fritz v. Hobson, 19 Am. Law Reg. 615 (1880); and note; Bushnell v. Robeson, 62 Iowa, 540; (Slaughter-house) Irwin v. Telephone Co., 37 La. An. 63; McDonald v. Newark, 42 N. J. Eq. (15 Staw.) 136. A *dense smoke* which is detrimental to certain classes of property and business and is a personal annoyance to the public at large

council that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the State within which a given structure can be shown to be a nuisance, can, by the mere declara-

is a public nuisance whether declared so by ordinance or not. *Harmon v. Chicago*, 110 Ill. 400; see cases below cited.

Ring of bells, blowing of horns, and other *unusual noises*, are treated as nuisances. They may or may not be nuisances according to circumstances. It is in the power, however, of the corporation at any time to treat all such, when in streets and public places, as nuisances, and prevent them. It is difficult to describe, though easy to imagine, such "an unusual noise" as would be a nuisance. Some examples may, however, be given. The noise of a tinsmith in carrying on his trade, if in a neighborhood where there is a number of offices, and of sufficient volume to prevent the occupants from following their lawful business, will, if it affect a considerable number of inhabitants, be deemed a public nuisance. *The King v. Lloyd*, 4 Esp. 200.

A *circus*, the performances in which were to be carried on for eight weeks near the plaintiff's house, and the performances, which took place every evening, lasted from about half-past seven till half-past ten o'clock. The noise of the music and shouting in the circus could be distinctly heard all over the house, and was so loud that it could be heard above the conversation in the dining-room, though the windows and shutters were closed. This was held to be a nuisance. *Inchbald v. Robinson*, L. R. 4 Ch. App. 388. If a man builds a *rolling-mill* close to inhabited cottages, so that the vibration produced by the hammers cracks the walls of the cottages, and the noise of the mill causes them to become and remain uninhabited, the rolling-mill will be a nuisance. *Scott v. Firth*, 4 F. & F. 349; s. c. 10 L. T. N. s. 240.

A *shooting ground* near a public highway, where persons come to shoot with rifles at pigeons, targets, &c., may be a nuisance. *The King v. Moore*, 3 B. & Ad.

184. So, by means of powder, working stone quarries near the public streets and dwelling-houses. *The Queen v. Mutters*, 10 Cox, 6; *Harr. Munic. Man.* 5th ed. 401, 402.

A corporation has no more right to license or maintain a nuisance than an individual would have, and for a nuisance maintained upon its property the same liability attaches against a city as to an individual. *Haag v. Co. Commrs*, 60 Ind. 511; *Petersburg v. Applegarth*, 28 Gratt. 321; *Brayton v. Fall River*, 113 Mass. 218; *Franklin Wharf Co. v. Portland*, 67 Me. 46; *Harper v. Milwaukee*, 30 Wis. 365; *Hannibal v. Richards*, 82 Mo. 330; *Wood on Nuisances*, sec. 742. *Infra*, sec. 375, note. A city was held liable for erecting a pest-house whereby plaintiff's premises became unhealthful and infected with the same disease, and the occupancy rendered unsafe and unpleasant. *Niblett v. Nashville*, 12 Heisk. 684. May pass ordinances to prevent as well as to remove nuisances. *Gregory v. New York*, 40 N. Y. 273; see *Wood on Nuisances*, secs. 740, 741, and cases cited. A city held to have no power to destroy a dam across a creek within its limits as a nuisance. *Clark v. Mayor, &c. of Syracuse*, 13 Barb. (N. Y.) 32. *Abatement by individuals and by public officers*. *Manhattan Manuf. & Fert. Co. v. Van Keuren*, 23 N. J. Eq. 251; *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397. Destruction of building by mob. *Brightman v. Bristol*, 65 Me. 426; s. c. 20 Am. Rep. 711. Under the laws of *New York* establishing boards of health, while the board of health of a town cannot go outside of its own boundaries to abate a nuisance summarily, it may restrain the violation of its order and enforce abatement, though the cause of the nuisance arises in an adjoining municipality. *Gould v. Rochester*, 105 N. Y. 46.



tion that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city, at the uncontrolled will of the temporary local authorities."<sup>1</sup>

<sup>1</sup> *Per Miller, J., Yates v. Milwaukee*, 10 Wall. 497 (1870); *Pieri v. Shieldsboro*, 42 Miss. 493; *Underwood v. Green*, 42 N. Y. 140; *Darst v. People*, 62 Ill. 306 (1869); *Miller v. Burch*, 32 Tex. 208 (1869); *Everett v. Council Bluffs*, 46 Iowa, 66 (1877), approving *Yates v. Milwaukee*; *Pye v. Peterson*, 45 Tex. 312 (1876); s. c. 23 Am. Rep. 608, approving *Yates v. Milwaukee*. *Cole v. Kezler*, 64 Iowa, 59; *Everett v. Marquette*, 53 Mich. 450 (a staircase in a sidewalk is not a nuisance *per se*); *St. Paul v. Gilfillan*, 36 Minn. 298 (dense smoke not a nuisance *per se*); *Joyce v. Woods*, 78 Ky. 386; *Green v. Lake*, 60 Miss. 451; *McCrowell v. Bristol*, 5 Lea (Tenn.), 685; *Ison v. Manley*, 76 Ga. 804. A person sick, even with contagious disease, in his own house or at a hotel, is not a nuisance. *Boom v. Utica*, 2 Barb. (N. Y.) 104 (1848).

Works that amount to a private nuisance, causing actual damage to private persons, cannot be justified, under a license from the city council to erect them. But the fact of such license is evidence of great but not conclusive weight in favor of the party erecting and owning the works claimed to be a nuisance. *Ryan v. Copes*, 11 Rich. (S. C.) Law, 217 (1858). A pig-sty in a populous place is, *per se*, a nuisance. *Com'lth v. Van Sickle*, Bright. (Pa.) 69. *Livery stable* in a town is not, *per se*, a nuisance, it depends upon its location and the manner in which it is built, kept, or used. *Aldrich v. Howard*, 7 R. I. 87; s. c. 8 R. I. 246; *Burditt v. Swenson*, 17 Tex. 489 (1856); *Morris v. Brower*, Anthon's N. P. (N. Y.) 368; *Flint v. Russell*, 5 Dillon C. C. R. 151 (1879); *Harrison v. Brooks*, 20 Ga. 537 (1856); *Wood on Nuisances*, secs. 528, 529; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Shiras v. Olinger*, 50 Iowa, 571; 20 Alb. L. J. 56. Nor is a liberty pole a nuisance *per se*. *Allegheny v. Zimmerman*, 10 Pitts. Leg. Jour. 168; s. c. 95 Pa. St. 287; *Dargan v. Waddell*, 9 Ire. (N. C. Law) 244; *Kirkman v. Handy*, 11 Humph. (Tenn.)

406; *Coker v. Birge*, 10 Ga. 336. A tannery is not, *per se*, a nuisance. *State v. Cadwalader*, 7 Vroom (36 N. J. L.), 283. *Brick-making*: *Wanstead, &c. v. Hill*, 13 C. B. (N. S.) 479. *Slaughter-house*: *Dubois v. Budlong*, 10 Bosw. (N. Y.) 700; *Atty.-General v. Steward* (5 C. E. Green), 20 N. J. Eq. 415; *Villavaso v. Barthet*, 39 La. An. 247; see cases in this note *supra*. *Powder-house*, with large quantities of powder therein, located in a city, is a nuisance. *Cheatham v. Shearon*, 1 Swan (Tenn.), 213, 216; *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 800. The manufacturing and keeping large quantities of gunpowder in towns or closely inhabited places is an indictable offence at common law. *Rex v. Williams*, 1 Russ. on Cr. \*439; *The King v. Taylor*, 2 Str. 1167; *Crowder v. Tinkler*, 19 Ves. 617. *Planing mill*: *Rhodes v. Dunbar*, 57 Pa. St. 274; *Duncan v. Hayes*, 22 N. J. Eq. 25 (1871). As to gas-works: *Cleveland v. Cit. Gasl. Co.*, 20 N. J. Eq. 201. *Steam flouring mill*: *Gilbert v. Showerman*, 23 Mich. 448. *Stock-yards*: *Id.* 296; *Ashbrook v. Commonwealth*, 1 Bush (Ky.), 139. *Porgy oil factory*: *Brightman v. Bristol*, 65 Me. 426 (1876); s. c. 20 Am. Rep. 711. *Privies*: *Wahle v. Reinbach*, 76 Ill. 322. *Gas companies*: *Cleveland v. Citizens' Gasl. Co.*, 5 C. E. Green (20 N. J. Eq.), 203. *Potteries*: *Ross v. Butler*, 19 N. J. Eq. 294. *Glass and broken-ware* in public place. *Ex parte Casinello*, 62 Cal. 538. *Smoke and noxious vapors* caused by burning, under public authority, clothing, bedding, &c., to prevent the spread of contagious diseases is not an indictable nuisance. *State v. Knoxville*, 12 Lea, 146. *Coasting* on a public street held not necessarily a nuisance. *Burford v. Grand Rapids*, 53 Mich. 98; see *post*, chap. on Streets. A wooden awning over a side-walk is not a nuisance *per se*. *Hawkins v. Sanders*, 45 Mich. 491; see Index, tit. *Awning*. Whether a particular lime kiln is a nuisance or not is a mixed question of law and of fact. *State v. Mott*, 61 Md. 297. A market-cart in a street held

§ 375 (309). **General Power over Nuisances.**— Power to municipal corporations to make "by-laws relative to *nuisances* generally" has been decided to authorize an ordinance prohibiting the keeping, in any manner whatsoever, of a *bowling-alley for gain or hire*, such a place being a public nuisance at common law.<sup>1</sup> So under power

not a nuisance *per se*. *State v. Edens*, 85 N. C. 522. A *wooden building* in a city is not a nuisance *per se*, but may become so by the way in which it is used. *Fields v. Stokley*, 99 Pa. St. 306. *Dead animals* are not nuisances *per se*, but may become such. *River Rendering Co. v. Behr*, 77 Mo. 91; *Underwood v. Green*, 42 N. Y. 140. *Flouring Mill*: Under the power to prevent nuisances and dangerous manufactories, a municipal corporation cannot, on petition of citizens, deal with a flouring mill as a nuisance, unless it is shown by the record to fall within some law or ordinance previously passed. *Lake v. Aberdeen*, 57 Miss. 260. In *Louisiana*, where the civil code (art. 655) provides that works, &c., causing annoyance "shall be regulated by the rules of the police or the customs of the place" where located, an ordinance of a city council ordering a blacksmith shop to be closed as a nuisance is authorized by law, and may be carried into effect by an injunction, procured by the city in its corporate name, restraining the owner from continuing the shop. *New Orleans v. Lambert*, 14 La. An. 247 (1859).

*Power of municipal corporations to remove nuisances, and how far their decision as to fact of nuisance is conclusive.* *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Kennedy v. Board of Health*, 2 Pa. St. 366; *Com'lth v. Van Sickle*, Bright. (Pa.) 69; *Green v. Savannah*, 6 Ga. 1; *Roberts v. Ogle*, 30 Ill. 459; *Clark v. Mayor, &c.*, 13 Barb. (N. Y.) 32; *Saltonstall v. Banker*, 8 Gray (Mass.), 195; *Kennedy v. Phelps*, 10 La. An. 227; *Green v. Underwood*, 42 N. Y. 140; *Mayor of Hudson v. Thorne*, 7 Paige (N. Y.), 261; *Salem v. Eastern R. Co.*, 98 Mass. 431; *Chicago v. Laffin*, 49 Ill. 172; *Babcock v. Buffalo*, 56 N. Y. 263; *Darst v. People* (intoxicating liquors), 51 Ill. 286 (1869). The power of municipal corporations, with respect to nuisances, is treated in the chapter xxii. of Mr. Wood's work on the Law of Nuisances. Instance of refusal by a court of chancery

to interfere with the municipal authorities in removing nuisances. *Ferguson v. Selma*, 43 Ala. 398 (1869).

Under the English Municipal Corporations Act the council of any borough is empowered to make by-laws for the good rule and government of the borough, and the prevention and suppression of nuisances (*ante*, sec. 337); and it is held that this power respecting the suppression of nuisances is confined to the suppression and prohibition of acts which, if done, *must necessarily and inevitably cause a nuisance*, and it does not empower the council to impose penalties for the doing of things which may or may not be a nuisance according to circumstances. Thus, where the town council imposed a fine upon every person who should "keep or suffer to be kept any swine within the borough between the first of May and the first of October," it was held that the by-law was wholly invalid, as the keeping of a pig did not necessarily create a nuisance. *Addison on Torts*, 34, citing *Everett v. Grapes*, 3 Law T. R. N. s. Q. B. 669; *Wanstead Local Board v. Hill*, 13 C. B. N. s. 479.

<sup>1</sup> *Tanner v. Albion*, 5 Hill (N. Y.), 121 (1843); followed, *Updike v. Campbell*, 4 E. D. Smith (N. Y.), 570 (1855); *The People v. Sergeant*, 8 Cow. (N. Y.) 139, which held that a room kept for the playing of billiards was not a public nuisance, though a profit was made of it, commented on and distinguished, and by *Cowen, J.*, doubted, in 5 Hill, *supra*. A power to "suppress and restrain" gaming held to grant power to license billiard playing. *In re Snell*, 58 Vt. 207. Whether a ball alley could be prohibited under the general authority to pass by-laws relative to good government, &c., was alluded to, but not determined. See *Jackson v. People*, 9 Mich. 111; *Smith v. Madison*, 7 Ind. 86. In *The State v. Hall*, 32 N. J. 158 (1867), it was held that a *ten-pin alley* kept for gain and public use in a town is not, *per se*, a nuisance. The law on the subject is very

to pass by-laws to prevent and remove nuisances, an ordinance may be passed inflicting a fine on any person who should exhibit a *stud-horse* in the streets of the corporation.<sup>1</sup>

fully examined in the opinion of *Beasley* C. J., and the case of *Tanner v. Albion*, *supra*, reviewed and disapproved. Where a city has, by its charter, the power to determine whether *bowling alleys* should be allowed, and, if so, under what restrictions, an ordinance requiring them to be closed at a certain hour is valid. *State v. Hay*, 29 Me. (15 Shep.) 457 (1849); *State v. Freeman*, 38 N. H. 426; *supra*, sec. 368, note. A statute of *Missouri* designed to suppress gambling in St. Louis authorized the police to seize gaming tables and gaming devices used for gambling, and made it the duty of the president of the police to cause the same to be publicly destroyed. This could be done without notice to the owner or any semblance of judicial investigation. The statute was declared unconstitutional as depriving the owner of such gambling tables, &c., of his property without due process of law. *Lowry v. Rainwater*, 70 Mo. 152 (1879); s. c. 35 Am. Rep. 420 (1879); 21 Alb. Law Jour. 72; *Fisher v. McGirr*, 1 Gray (Mass.), 1; *Hibbard v. People*, 4 Mich. 126; *Lincoln v. Smith*, 27 Vt. 354. Under authority to pass such ordinances as the council "may consider fit and proper to remove nuisances or causes of disease," &c., it was held that the city of Savannah might prohibit the growing of rice within the corporate limits, as being injurious to the health of the city, and abate the same, and that such an ordinance was valid as a police regulation. *Green v. Savannah*, 6 Ga. 1 (1849). City held to have no power to license a *keno table* to be kept for gaming. *Schuster v. State*, 43 Ala. 199 (1872). Where proceedings in respect to nuisances are instituted by order of the city council, *chancery will not enjoin or interfere*, "unless the municipal corporation have clearly transcended their powers." *Kennedy v. Phelps*, 10 La. An. 227 (1855) (building for curing hides); s. p. *Milne v. Davidson* (private hospital), 5 Mar. (La.) 586 (1827); *Potter v. Menasha*, 30 Wis. 492 (1872); *post*, sec. 405, note.

<sup>1</sup> *Nolin v. Franklin*, 4 Yerger, 163 (1833). Under power "to prevent and remove nuisances," a corporation may, if a vacant building is so used as to endanger by fire the property of others, or the health of the community, declare the same a nuisance, and notify owner to abate it, and if he fails, the individual officer of the corporation who abates the nuisance may, on being individually sued, justify the act. *Harvey v. Dewoody*, 18 Ark. 252 (1856).

Where a city council has authority under its charter to prevent and remove all nuisances within the city, "such as all decayed and dilapidated houses and structures calculated to produce disease of any kind, or unfit for use or habitation," &c., a court of chancery will not interfere to prevent the removal of such nuisance unless it appears that the complainant's right is illegally assailed, or threatened with an irreparable injury, and there is no sufficient remedy at law. *Ferguson v. Selma*, 43 Ala. 398 (1869). In this case the court denied an injunction to prevent the removal by the city authorities of two old, dilapidated, substantially valueless houses, on a lot in an improving and flourishing part of the city, which were filthy, and crowded with filthy tenants, and which had also been condemned as a nuisance by the board of health of the city. *Ib.*; *infra*, secs. 377, 405, note. But a city under a charter authorizing the common council "to regulate all wharves on the shore of the Ohio River adjoining said city," cannot by ordinance define the line of high-water mark, and declare the erection of buildings below said line a nuisance, and impose a fine upon persons erecting such buildings on their own lands. *Evansville v. Martin*, 41 Ind. 145 (1872). In *Nevada v. Hutchins*, 59 Iowa, 506, it was held that, under a power to abate nuisances, an incorporated town is not authorized to pass an ordinance imposing a fine for maintaining a nuisance; but *quaere*.

If a sewer is declared to be a private nuisance to property, the owner is entitled

§ 376 (310). **Suppression of Houses of Ill-fame.** — Power “to suppress *bawdy-houses*” gives the corporation authority, by implication, to adopt by ordinance the proper means to accomplish the end; and among the methods which may be adopted is one forbidding the owners of houses from renting or letting the same for this purpose or with knowledge that they are to be thus used.<sup>1</sup> But power to the common council of a city “to make all such by-laws as it may deem expedient for effectually preventing and suppressing houses of ill-fame,” does not authorize the council to decide that a given house is kept for that purpose, nor, if kept for that purpose, does it authorize the council to order it to be demolished; nor if thus demolished, will it justify the officers of the city who did it, in execution of the ordinance and resolution of the council.<sup>2</sup> Neither

to an injunction against the city as he would be against a private individual; but a court in granting such injunction will postpone its operation a reasonable time in order to enable the city to take adequate measures to remove the nuisance without unnecessary injury to the public health and interests. *Haskell v. New Bedford*, 108 Mass. 208; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Attorney-General v. Birmingham*, 4 K. & J. 528; *Spokes v. Banbury*, L. R. 1 Eq. 42; *Goldsmid v. Tunbridge*, L. R. 1 Eq. 161; *Attorney-General v. Bradford*, L. R. 2 Eq. 71; *Attorney-General v. Colney, &c.*, L. R. 4 Ch. 146; *Breed v. Lynn*, 126 Mass. 367; *supra*, sec. 374, note.

<sup>1</sup> *Childress v. Mayor, &c.*, 3 Sneed (Tenn.), 347 (1855); *Shreveport v. Roos*, 35 La. An. 1010. The legislature may confer exclusive power upon a city to prohibit and suppress bawdy-houses; in such case the general State law upon the subject was held to be superseded by an ordinance passed to enforce the power. *Rogers v. The People*, 9 Col. 450 (*quære*); *supra*, sec. 366; *post*, secs. 396, note, 432-436 and notes. Construction of power “to regulate or suppress bawdy-houses.” *State v. Clarke*, 54 Mo. 17 (1873); *State v. De Bar*, 58 Mo. 395 (1874); commented on, *ante*, sec. 87, note; *post*, sec. 436. Power to make by-laws relative to nuisances gives authority to impose penalties on the keepers of houses of ill-fame, and on persons owning houses used, with their knowledge, for this purpose. *McAlister v. Clark*, 33 Conn. 91 (1865); see *Ely v. Supervisors*, 36 N. Y.

297; *Shaffer v. Mumma*, 17 Md. 331 (1861). In prosecutions for keeping bawdy-houses, the law, it has been said, so far relaxes the ordinary rule that common reputation as to the character of the defendants, and of the houses which they keep, is admissible. *State v. McDowell, Dudley* (S. C.), Law, 346. A power to “repress and restrain disorderly houses” held to confer power to make it penal to visit such houses. *State v. Botkin*, 71 Iowa, 87; s. p. *Re Johnson*, 73 Cal. 228 (1887). A power to “license, regulate, and suppress” includes power to prevent soliciting for bawdy-house, &c. *Thomas v. Hot Springs*, 34 Ark. 553. Keeping house of ill-fame, what? *Queen v. Rice*, L. R. 1 C. C. 21. Sufficient to charge that the defendant did on, &c., in the city of, &c., keep a common disorderly bawdy-house on a specified street in said city, as a place of resort for both men and women of lewd character. *Queen v. Munro*, 24 Upper Can. Q. B. 44; *Queen v. Levecque*, 30 Upper Can. Q. B. 509; *Queen v. Smith*, 35 Upper Can. Q. B. 518; *Harr. Mun. Man.* 5th ed. 395.

An ordinance to prevent the keeping of bawdy-houses held to be clearly within a charter authority to adopt by-laws “for preserving peace, order, and good government.” *State v. Williams*, 11 S. C. 288.

<sup>2</sup> *Welch v. Stowell*, 2 Doug. (Mich.) 332 (1846). In England municipal corporations have the power to prevent indecent public exposure of the person and other indecent exhibitions. In order to render a person liable to an indictment for indecently exposing his person in a public place, it is

does such a power authorize an ordinance making it a misdemeanor for a prostitute to reside or be found within the corporate limits,<sup>1</sup> nor to return to a city.<sup>2</sup>

§ 377 (311). **Nuisances upon Rivers within City Limits.** — A city charged by law with the duty of preventing obstructions of a river within its limits may, by its own act, and without proceeding by indictment, abate or remove anything which obstructs the free and public use of the river, such as a *floating storehouse*, calculated to remain stationary in the water, and which exclusively occupies a portion of the river, such a structure being a public nuisance.<sup>3</sup> It is no answer to this right of abatement that room enough is left for the public, or that the structure is beneficial,<sup>4</sup> or that the party erecting it is the owner of the adjacent lots.<sup>5</sup>

§ 378 (312). **Power to demolish ; Indictment.** — But under the power to abate nuisances, property lawfully erected and existing, or a house which is only a nuisance because occupied by a business which is such, cannot be destroyed or demolished. The public can proceed by indictment, or the business carried on in the house be suppressed.<sup>6</sup>

not necessary that the exposure should be made in a place open to the public. *The Queen v. Thallman*, 9 Cox C. C. 388 ; s. c. 9 L. T. N. s. 425. If the act is done where a great number of persons may be offended by it, and several see it, it is sufficient. *Ib.* If the indictment, however, charge the offence to have been committed on a highway, such an indictment will not be sustained by evidence that the offence was committed in a place *near* the highway, though in full view of it. *The Queen v. Farrell*, 9 Cox C. C. 446. An indecent exposure in a place of public resort, if actually seen by only one person, no other person being in a position to see it, is not an indictable offence. *The Queen v. Webb*, 1 Den. C. C. 338 ; *The Queen v. Watson*, 2 Cox C. C. 376 ; *The Queen v. Farrell*, 9 Cox C. C. 446. A party was indicted for an indecent exposure in an omnibus, several passengers being therein. *Held*, a public place. *The Queen v. Holmes*, 3 C. & K. 360. But a urinal, with boxes or divisions for the convenience of the public, though situated in an open market, was held not to be a public place within the meaning of the allegation. *The Queen v. Orchard*, 3 Cox C. C.

248. Keeping a booth in a public place containing an indecent exhibition for hire, is an indictable offence. *Regina v. Saunders*, L. R. 1 Q. B. Div. 15 ; *Harr. Munic. Manual*, 5th ed. 394, 397.

<sup>1</sup> *Buell v. State*, 45 Ark. 336.

<sup>2</sup> *Paralee v. Camden*, 49 Ark. 165.

<sup>3</sup> *Hart v. Mayor, &c. of Albany*, 9 Wend. (N. Y.) 571 (1832), a valuable and very carefully considered case, affirming s. c. 3 Paige (N. Y.), Ch. 213 ; *People v. Vanderbilt*, 28 N. Y. 396. See *Dutton v. Strong*, 1 Black, 23. The corporate body may abate or remove the nuisance ; but without *express authority* cannot ordain a *forfeiture* of the structure, or seize and *sell it*, or convert the materials to their own use. *Hart v. Mayor*, 9 Wend. (N. Y.) 571, 609, *supra* ; *Compton v. Waco Bridge Co.*, 62 Tex. 715.

<sup>4</sup> *Ib.* ; *Respublica v. Caldwell*, 1 Dal. 150 ; *King v. Russell*, 6 East, 427 ; *King v. Cross*, 3 Camp. 224 ; *King v. Jones*, 3 Camp. 229.

<sup>5</sup> *Hart v. Mayor, &c.*, 9 Wend. (N. Y.) 571, 608 ; *Strange R.* 1247 ; 3 Bac. Abr. 686 ; 1 Hawk. P. C. 363, note 1.

<sup>6</sup> *Clark v. Syracuse*, 13 Barb. (N. Y.) 32 ; *Welch v. Stowell*, 2 Doug. (Mich.)

§ 379. **Extent of Authority over Nuisances.** — Finally, it may be remarked that *the extent of municipal authority over nuisances* depends, of course, upon the powers conferred in this regard upon the municipality. They may be general or specific, or both. The authority to preserve the health and safety of the inhabitants and their property, as well as the authority to prevent and abate nuisances, is a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance.<sup>1</sup> The authority to *declare* what is a nuisance is somewhat broader; but neither this nor the general authority mentioned in the last preceding sentence will justify the declaring of acts, avocations, or structures not injurious

332 (1846); *Miller v. Burch*, 32 Tex. 208 (1869); s. c. 5 Am. Rep. 242. A license from a board of health to carry on a manufactory of fertilizers cannot be urged as a defence to an indictment for creating a public nuisance by the process of manufacturing. *Garrett v. State*, 49 N. J. L. 94.

*When equity will interfere to prevent and remove nuisances which affect the public generally.* *People v. St. Louis*, 5 Gilm. (10 Ill.) 372; *Hoole v. Attorney-General*, 22 Ala. 190; *Attorney-General v. Gas Co.*, 19 Eng. Law & Eq. 639; *Aldrich v. Howard*, 7 R. I. 87; *Zabriske v. Jersey City & B. R.*, 13 N. J. Eq. 314; *Jersey City v. Hudson*, *Id.* 420; *Attorney-General v. Brown*, 9 C. E. Green (24 N. J. Eq.), 89; *Moore v. Walla Walla*, 2 Wash. Ter. 184; *Metropolitan City Ry. Co. v. Chicago*, 96 Ill. 620; *Wood on Nuisances*, chap. xxv.; *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 800 (1857). "It is now well settled that, in addition to the purely legal remedies, which may be resorted to in such cases, courts of equity will take jurisdiction of such public nuisances, and, in proper cases, afford relief by *injunction*, especially where the nuisance threatened or committed is of a nature to be permanent or continuous." *Dickinson, J., Stearns County v. St. Cloud, M. & A. R. Co.*, 36 Minn. 425; see *post*, sec. 405, note; Index, title *Injunction*. A city council may, by resolution, direct its officers to proceed against a specified establishment as a nuisance, and cause the same to be abated under a general ordinance of the corporation; this is a different thing from passing an ordinance inflicting a fine upon a particular

person for keeping a nuisance, which cannot be lawfully done. *Kennedy v. Phelps*, 10 La. An. 227 (1855). See *Commonwealth v. Goodrich*, 13 Allen (Mass.), 545; *Municipality v. Blinneau*, 3 La. An. 688. The power to abate nuisances must be reasonably exercised, so as to do the least practicable injury to private rights. *State v. Newark*, 5 Vroom (38 N. J. L.), 264; *Wood on Nuisances*, sec. 741. Power to suppress gambling-houses does not, it is apprehended, authorize the corporation to demolish the houses so used. All common gaming-houses are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices, and entice numbers of persons to idleness, whose time might be otherwise employed for the good of the community. 1 Hawk. P. C. cap. 32, s. 4; *Bosley v. Davies*, L. R. 1 Q. B. Div. 84; *Brodie & Bowmanville*, 38 Upper Can. Q. B. 580; *Harrison Munic. Manual*, 5th ed. 396. As to liability of a city authorized to abate nuisances for failure to exercise the power. *Kiley v. Kansas*, 69 Mo. 102; *Parker v. Macon City*, 39 Ga. 729; *Bassett v. St. Joseph*, 53 Mo. 290; *Cain v. Syracuse*, 95 N. Y. 83. *Post*, chap. xxiii. Where a municipal corporation does an act, lawful in itself, in such a manner as to create a nuisance, it is liable in the same manner that an individual would be. *Judge v. Meriden*, 38 Conn. 90 (1871); *Railroad Co. v. Norwalk*, 37 Conn. 109; *Mooty v. Danbury*, 45 Conn. 550 (1878). More fully, *post*, chap. xxiii.

<sup>1</sup> *Ante*, secs. 141, 144, 369 *et seq.*, 374; *post*, sec. 396, and note.

to health or property to be nuisances.<sup>1</sup> Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights, or clearly transcend the powers granted to them;<sup>2</sup> in which case the contemplated action may be prevented or the injuries caused, redressed by appropriate suit or proceedings. As there is in such cases a judicial remedy in favor of the citizen, so on principle the right of the corporate authorities to resort at their election to the courts in proper cases, to aid them when the citizen is in the wrong, should, in the author's judgment, be also recognized.<sup>3</sup> It is not unusual to invest the municipal council with *special authority* in respect of particular avocations, trades, acts, omissions, and structures, with a view to conserve the public health and safety, of which many examples have been given in the notes to this chapter. The terms in which such authority is conferred measure its scope, but in view of the end for which it is given, it is not subjected to a hostile or even a narrow construction.<sup>4</sup>

§ 380 (313). **Markets, and of the Power to establish and regulate.** — The States, under their police power, may delegate to municipal corporations the *authority to establish, or authorize the establishment of markets*; and it is competent to such corporations, under proper grants of power, to enact ordinances forbidding sales and purchases of marketable articles, except at designated market-places. The extent of the power possessed by a particular corporation depends upon its charter. In England the regulation of markets by by-laws has long been exercised, and such by-laws are sustained as being reasonable, and conducive to the health and good government of the municipality.<sup>5</sup> In this country the practice is almost uni-

<sup>1</sup> *Supra*, sec. 374, and notes.

<sup>2</sup> *Ante*, secs. 94, 95, 319, 320 *et seq.*

<sup>3</sup> *Post*, sec. 405, note. The principles upon which courts of equity interfere by injunction in the case of nuisances are clearly stated by Ld. Chancellor Brougham in *Earl of Ripon v. Hobart*, 3 Mylne & Keen, 169, 179. See also *Flint v. Russell*, 5 Dillon, 151, where the authorities are collated.

<sup>4</sup> *Post*, sec. 396, and note.

<sup>5</sup> *Pierce v. Bartram*, Cowp. 270; *Player v. Jenkins*, 1 Sid. 284; *Rex v. Cottrell*, 1 B. & Ald. 67 (1817). See also *Mosley v. Walker*, 7 Barn. & Cr. 40; *Macclesfield v. Pedley*, 4 Barn. & Adol. 397; *Grant on*

*Corp.* 166, as to exclusive privileges in England as to markets and market tolls. *Definition.* — A market is a franchise or liberty derived from the crown, by grant, or prescription which presupposes a grant. 2 Black. Com. 37. "It is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale." *Per Breese, J.*, *Caldwell v. Alton*, 33 Ill. 416. Under the police power it is competent for the legislature to prohibit private markets within a reasonable designated distance of the public market. *New Orleans v. Stafford*, 27 La. An. 417; s. c. 21 Am. Rep. 563.

versal on the part of the legislature to confer upon the municipal agencies more or less authority with respect to markets and market-places, and such grants are not so strictly construed as those which invest the corporation with powers of a more extraordinary or unusual character; at least such is the case unless a monopoly in favor of private individuals is sought to be sustained, against which the courts strongly lean.<sup>1</sup>

§ 381 (314). **Power to Build and Establish.** — Incorporated cities and towns may have the power to build market-houses without an *express* grant. Thus it has been held that a town having authority "to make by-laws for managing and ordering its *prudential* affairs" has power — the court looking somewhat to usage and custom to ascertain what subjects of common interest are embraced under the term "*prudential*" — to appropriate money for the erection of a market-house, and to raise the amount by taxation. This power, it was admitted, more clearly exists in the case of large towns and populous villages.<sup>2</sup>

"A *municipal market* consists: 1. In a place for sale of provisions and articles of daily consumption. 2. Convenient fixtures. 3. A system of police regulations, fixing market hours, making provisions for lighting, watching, cleaning, detecting false weights and unwholesome food, and other arrangements calculated to facilitate the intercourse and ensure the honesty of buyer and seller. 4. Proper officers, to preserve order and enforce obedience to the rules." *Per Lane, C. J., Cincinnati v. Buckingham*, 10 Ohio, 257 (1840).

<sup>1</sup> *Wartman v. Philadelphia*, 33 Pa. St. 202, 209 (1854); *LeClaire v. Davenport*, 13 Iowa, 210; *White v. Kent*, 11 Ohio St. 550; *St. John v. Mayor, &c. of New York*, 6 Duer (N. Y.), 315; *Ash v. People*, 11 Mich. 347; *St. Louis v. Jackson*, 25 Mo. 37; *St. Louis v. Weber*, 44 Mo. 547 (1869); *Nightingale, In re*, 11 Pick. (Mass.) 168; *Cougot v. New Orleans*, 16 La. An. 21; *Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *Yates v. Milwaukee*, 12 Wis. 673; *Bethune v. Hughes*, 28 Ga. 560; distinguished, *Badkins v. Robinson*, 53 Ga. 613 (1875); *Ketchum v. Buffalo*, 14 N. Y. 356; *Municipality v. Cutting*, 4 La. An. 336; *New Orleans v. Guillotte*, 12 La. An. 818 (corporate partnership with individuals); *State v. Lieber*, 11 Iowa,

407; *Dubuque v. Miller*, 11 Iowa, 583; *Morano v. New Orleans*, 2 La. 217; *St. Paul v. Coulter*, 12 Minn. 41; *Atlanta v. White*, 33 Ga. 229.

The power to establish and regulate markets, like most other municipal powers, is a *continuing one*, and markets once established may be abandoned or changed at the pleasure of the corporation, and the taxpayers or property owners cannot restrain the action or determination of the council entrusted by the charter with the exercise of the power. *Gall v. Cincinnati*, 18 Ohio St. 563 (1869).

<sup>2</sup> *Spaulding v. Lowell*, 23 Pick. (Mass.) 71 (1839). If the real and principal object is the building of a market-house, the appropriation of a portion of the building for other purposes, as the holding of courts, does not render the erection of the building illegal. If, however, the building of the market-house is merely colorable, that is, done for the purpose of accomplishing distinct and unauthorized objects, it would, says Chief Justice *Shaw*, probably be treated as an abuse of power and a nullity. *Ib.* Power "to appoint market-places and to regulate the same" was held, in connection with a general welfare clause, to authorize the corporation to build a market-house. *Smith v. Newbern*, 70 N. C. 14 (1874); s. c. 16 Am. Rep. 766.



§ 382 (315). **Power to Establish and Regulate.** — Power conferred upon a municipality “to *establish* and regulate markets,” authorizes, as a necessary incident, the purchase of ground upon which to erect a market building.<sup>1</sup> If the title to land purchased for the erection of a market-house be taken by the municipal corporation in fee, no length of use of the same for a market will *dedicate* it for market purposes; and the markets may be abandoned or changed at the will of the council, and the land thus acquired and held be sold.<sup>2</sup> It is incident to the general power to build a market to determine upon the form, dimensions, and style of the edifice, and therefore to employ an architect to prepare plans, specifications, &c.<sup>3</sup>

§ 383 (316). **Limitation of such Power.** — But power to a municipal corporation to establish markets and build market-houses will not give the authority *to build them on a public street*. Such erections are nuisances though made by the corporation, because the street, and the entire street, is for the use of the whole people. They are nuisances when built upon the streets, although sufficient space be left for the passage of vehicles and persons. Such erections may, it seems, be legalized by an express act of the legislature. But unless so legalized, a nuisance erected and maintained by a public corporation may be proceeded against, criminally or otherwise, the same as if erected by private persons.<sup>4</sup>

<sup>1</sup> Ketchum v. Buffalo, 14 N. Y. 356; 17 N. Y. 449; Caldwell v. Alton, 33 Ill. 416. It is immaterial whether this power is conferred in express or direct terms, or given only as part of the power to make by-laws, ordinances, &c. *Per Selden, J.*, in Ketchum v. Buffalo, 14 N. Y. 356, 362. Purchase of land for market. People v. Lowber, 28 Barb. (N. Y.) 65; s. c. more fully, 7 Abb. (N. Y.) Pr. 158; Gale v. Kalamazoo, 23 Mich. 344 (1871).

<sup>2</sup> Gall v. Cincinnati, 18 Ohio St. 563; Cooper v. Detroit, 42 Mich. 584. Construction of market-grants in England. Where according to the grant of a market it was to be held in a town, the grantee might from time to time remove the place for holding it according to the convenience of the inhabitants for the time being. Dixon v. Robinson, 3 Mod. 108; Curwen v. Salkeld, 3 East, 538; The King v. Cotterill, 1 B. & Al. 67; Wortley v. The Nottingham Local Board, 21 L. T. N. s. 582. And this applies, although the limits of the town be afterwards extended and the

market established within the extended limits. Mayor, &c. of Dorchester v. Ensor, L. R. 4 Ex. 335. But this is subject to the rights of any person owning property adjoining the site of the old market. Ellis v. The Corporation of Bridgnorth, 4 L. T. N. s. 112; 2 Johns. & H. 67; 15 C. B. N. s. 52; Harr. Munic. Manual, 5th ed. 451 *et seq.*, and cases.

<sup>3</sup> Peterson v. Mayor, &c. of New York, 17 N. Y. 449 (1858). His unauthorized employment by a committee is ratified by a resolution of the council passed with notice of the facts, adopting his plans, drawings, &c., and he may recover of the city for the labor and service of preparing them. *Ib.*

<sup>4</sup> Wartman v. Philadelphia, 33 Pa. St. 202, 210 (1854); St. John v. New York, 3 Bosw. (N. Y.) 483; State v. Mobile, 5 Port. (Ala.) 279 (1837); Commonwealth v. Rush, 14 Pa. St. (2 Harris) 186; Commonwealth v. Bowman, 3 Pa. St. (3 Barr) 202, 206; McDonald v. Newark, 42 N. J. Eq. (15 Stew.) 136. See chapter on

§ 384 (317). **Power under General Welfare Clause.** — Every municipal corporation which has power to make by-laws and establish ordinances to promote the general welfare and preserve the peace of a town or city may fix the time or places of *holding public markets* for the sale of food, and make such other regulations concerning them as may conduce to the public interest.<sup>1</sup> The right to establish a market includes the right to abandon it, or shift it to another place when the public convenience demands it; and of this the council is the judge.<sup>2</sup>

§ 385 (318). **Nature of Power to Establish and Regulate.** — A city corporation was invested by its charter with power "to erect market-houses, to establish markets and market-places, and to provide for the government and regulation thereof," and it was at first decided, and in the author's judgment properly decided, by the Supreme Court of the State, that this did not authorize the corporation to pass an ordinance *delegating* to an individual the right to erect market-houses, and to charge rent for the use of the stalls therein, reserving to itself no power to *control* the same, and that the corporation could not compel persons to go to such markets; but subsequently this ruling was reversed, and it was held that such an ordinance was valid, and that the city had the power to authorize the erection of market-houses by an individual, and to declare the same a public market, and to covenant to protect the owner in the exclusive privilege thereof; and that the city was liable for failing to protect him by the passage of the requisite ordinances, he having, on the faith of the ordinance, erected an expensive market-house.<sup>3</sup>

Streets, *post*, secs. 657, 660. Under the Constitution of *New Jersey*, the legislature cannot authorize a market in the public streets without providing compensation to adjoining lot owners. *State v. Laverack*, 34 N. J. Law, 201 (1870); *Higgins v. Princeton* (injunction refused), 4 Halsted Ch. 309, 320.

<sup>1</sup> *Per Black*, C. J., *Wartman v. Philadelphia*, 33 Pa. St. 202, 209 (1854). Note his observations in this case upon the necessity and convenience of markets.

<sup>2</sup> *Ib.* "The right to *establish* markets is a branch of the sovereign power, and the right to *regulate* them is necessarily a power of municipal police." *Per Eustes*, C. J., *Municipality v. Cutting*, 4 La. An. 335.

<sup>3</sup> *Le Claire v. Davenport*, 13 Iowa, 210

(1862); overruling *Davenport v. Kelly*, 7 Iowa, 102. It may be suggested that the right to pass such an ordinance, and the liability for failing to pass others, may admit, at least, of fair debate, in view of the surrender by the city of its charter powers, and its inability in law to make binding contracts with reference to the future exercise of its legislative authority. The soundness of this suggestion is confirmed by the decision in *Gale v. Kalamazoo*, 23 Mich. 344 (1871), *post*, chap. xxiii. In the *Kelly* case, *supra*, the point was decided, and is not overruled, that the charter power to establish markets, &c., conferred upon the council the authority to prohibit the exposing and offering for sale meat in any other places than those the ordinance designated. *Ash v.*

§ 386 (319). **Construction of Special Powers in Relation to Markets.** — Power to make “by-laws relative to the public markets,” &c., while it would not authorize a corporation entirely to prohibit the sale of meats, &c., within its limits, because this would be in general restraint of trade, will nevertheless authorize a by-law forbidding the *hawking about* or *selling by retail*, meats, &c., except at the public markets and within certain limits about the same.<sup>1</sup> The courts differ somewhat in their construction of the extent of the power to *establish* and *regulate* markets, as will be seen by the cases cited in the note.<sup>2</sup>

People, 11 Mich. 347; Hatch v. Pendergast, 15 Md. 251.

A city in granting a license and selling to a party the right to occupy a stall in the market *does not impliedly contract to protect the lessee* from competition by unlicensed persons; nor can such a contract be implied against the corporation from the existence of an ordinance prohibiting the same; and the failure of the officers of the corporation, though wilful, to enforce the ordinance against unlicensed sellers, is no defence to a bond given by the lessee for the payment of stall rent. Peck v. Austin, 22 Texas, 261 (1858). Nor does a city owning and leasing a market-house impliedly engage or covenant that it will not exercise its power to establish markets by erecting other market-houses and leasing them to others; if it does so, the injury to the first lessees is *damnum absque injuria*. Cougot v. New Orleans, 16 La. An. 21 (1861). A municipal corporation may contract for building a market-house with an individual or corporation, conceding in consideration of such building, and the use of part of the same, exclusive market privileges in such city, with rights to lease stalls, collect rents, and exemption from taxes for twenty-one years; but a purchaser at a sale under a judgment against the owner takes only the right of the owner bound by the judgment, but this will not affect the rights of the city to use of the rooms contracted for, of which it had possession. Palestine v. Barnes, 50 Tex. 539.

As to duty of corporation where they sell or farm out an exclusive privilege to vend articles, to enforce ordinances designed to protect the privilege. La Rosa v. New Orleans, 4 La. 24; Rosa v. Same,

1 La. 126; New Orleans v. Peyroux, 6 Martin, N. S. (La.) 155; Griffon v. New Orleans, 5 Martin, N. S. (La.) 279. City corporation cannot agree to abdicate its legislative powers in relation to markets, nor contract to create a monopoly. Gale v. Kalamazoo, 23 Mich. 344 (1871); *ante*, sec. 362.

<sup>1</sup> Buffalo v. Webster, 10 Wend. (N. Y.) 100 (1833). Chief Justice *Savage* affirms, *arguendo*, that such an ordinance would be valid under the common-law power of corporations to make by-laws for the general good of the corporation. *Id.* Approving Pierce v. Bartram, Cowp. 269; following Bush v. Seabury, 8 Johns. (N. Y.) 418 (1811), and distinguished from Dunham v. Rochester, 5 Cow. (N. Y.) 462; Shelton v. Mobile, 30 Ala. 540 (1857). “The fixing the *place* and times at which markets shall be held and kept open,” says the Supreme Court of *New York* in Bush v. Seabury, 8 Johns. (N. Y.) 418, “and the prohibition to sell at other places and times, are among the most ordinary regulations of a city or town police, and would naturally be included in the general power to pass by-laws relative to the public markets. If the corporation had not the power in question, it is difficult to see what useful purpose could be effected, or what object was intended, by the grant of power to pass laws ‘relative to the public markets.’”

<sup>2</sup> Power to make ordinances concerning “markets, health, and good order” of the town authorizes an ordinance prohibiting the sale of butcher’s meat within the corporate limits, excepting at the public market. Winnsboro v. Smart, 11 Rich. (S. C.) Law, 551 (1858). It seems the defendant was convicted, though he sold the meat inside his own

§ 387 (320). **Stands in Streets.** — In a well-considered case in Massachusetts it is decided that a city corporation has the clear *right*

blacksmith shop. Such ordinances are sustained, says the court, on the ground that they are not in restraint of trade, but a proper regulation of it. *Ib.* Legislative power to a city "to erect market-houses, establish markets and market-places, and provide for the government and regulation thereof," authorizes an ordinance with a pecuniary penalty, providing that fresh beef shall not be sold in the city less than by the quarter at any other than the market-place during market hours. *Bowling Green v. Carson*, 10 Bush (Ky.), 64 (1873). So, in *St. Louis v. Jackson*, 25 Mo. 37 (1857), where it appeared that the city, under proper authority, had erected a public, or city, market-house, and that by its charter it had power also, "to regulate," by ordinance, the sale of meats, it was held that this gave the city authority to provide, by ordinance, that "no person, not a lessee of a stall in the market, shall sell, or offer for sale, meat in less quantities than one quarter." The court considered such an ordinance as reasonable, highly proper, and not in restraint of trade, and not embraced in the reasoning in the case of *Dunham v. Trustees of Rochester*, 5 Cow. (N. Y.) 462; s. p. see, also, *St. Louis v. Weber*, 44 Mo. 547 (1869); *Le Claire v. Davenport*, 13 Iowa, 210; *Davenport v. Kelley*, 7 Iowa, 102; *Ash v. People*, 11 Mich. 347. But in *Caldwell v. Alton*, 33 Ill. 416 (1864), where the city, by its charter, had power "to establish and regulate markets," and under the power passed an ordinance forbidding, during market hours, the sale of vegetables outside the limits of the market, it was held that the city could not restrain a regular dealer or merchant from vending vegetables at his place of business outside of market limits during any part of the day, such a restraint of trade being unreasonable. The court reviewed many of the cases in other States on this subject, and were of opinion that the power to regulate could only extend to the market limits, and that these limits could not, under this power, be made to extend throughout the city. The court adhered

to its views in a subsequent case, in which it was held that power "to erect market-houses, establish markets and market-places, and provide for the government and regulation thereof," does not authorize the council of a large and growing town to fix upon one market-place, and prohibit all persons at all hours of the day from selling fresh meats elsewhere. Such an ordinance was regarded as unreasonable, in restraint of trade, and tending to create a monopoly. It was admitted, however, that if the ordinance had fixed a reasonable number of hours each day in which the prohibition should operate, leaving persons free to sell outside of market hours, it would probably be unobjectionable. *Bloomington v. Wahl*, 46 Ill. 489 (1868). So, in *Bethune v. Hughes*, 28 Ga. 560 (1859), the court, leaning against exclusive privileges, held that power by the charter to the corporation "to establish and keep up a public market in the city for the sale of," &c., does not confer upon the city power to pass an ordinance prohibiting the sale of marketable articles elsewhere than at the market-place. *Distinguished*, *Badkins v. Robinson*, 53 Ga. 613 (1875); s. p. *St. Paul v. Laidler*, 2 Minn. 190 (1858); commented on and disapproved in *St. Louis v. Weber*, 44 Mo. 547 (1869); see *St. Paul v. Coulter*, 12 Minn. 41. Charter power to a city, "to establish public markets and other public buildings, and make rules and regulations for the government of the same, to appoint suitable officers for overseeing and regulating such markets and to restrain all persons from interrupting or interfering with the due observance of such rules and regulations," does not confer upon its common council authority to pass an ordinance prohibiting "every farmer, gardener, or person producing vegetables" from selling the same in and along its streets without first procuring an annual license from the city authorities, paying therefor into the city treasury the sum of twenty-five dollars. *St. Paul v. Traeger*, 25 Minn. 248 (1878); and see *Burlington v. Dankwardt*, 73 Iowa, 170 (1887). The nature of the

*to prohibit, by ordinance, the occupation of a stand for the vending of commodities in the streets.* It may thus prohibit not only its own inhabitants, but others. It may make the prohibition absolute, or it may make it conditional on obtaining license or permission. It is in the nature of a police regulation, and does not violate private rights or improperly restrain trade.<sup>1</sup>

power "to establish public markets," &c., is very satisfactorily discussed in this case by *Cornell, J.* An ordinance regulating the killing and bleeding of meats is authorized by power to regulate butchers, the place and mode of selling, and to prevent unlicensed persons from acting as butchers. *City of Brooklyn v. Cleves, Hill & Denio (N. Y.) Suppl. 231 (1843).* Under power to regulate the vending of meats, a conviction under an ordinance forbidding the sale of unwholesome meats and other provisions cannot be sustained for selling putrid eggs. *Mayor, &c., of Rochester v. Rood, Hill & Denio (N. Y.), Suppl. 146.*

By the Municipal Act of Canada the council may pass by-laws "for establishing and regulating all markets; for preventing or regulating the sale by retail in the public streets of any meat, vegetables, fruit, or beverages; for regulating the place and manner of selling and weighing butcher's meat, fish, hay, straw, fodder, wood, and lumber, &c. *Harr. Munic. Manual, 5th ed. p. 451.* The following cases, digested by Mr. Harrison, show the judicial construction of the act.

The power under the act is to regulate *all* markets established, apparently including those established by the Crown, as well as those established by municipal authority. "Regulation must of necessity include the appropriation of one or more parts of the market for one purpose, and other part or parts for other purposes; of providing that free passage through the market be kept open for ready access to shops, stalls, or other places where different commodities are exposed for sale. *Per Draper, C. J., in Kelly and the Corporation of the City of Toronto, 23 Upper Can. Q. B. 426.*" A by-law enacting "that no butcher or other person shall cut up or expose for sale any fresh meat in any part of the city except in the shops and stalls in the public markets, or at such places as the

Standing Committee on Public Markets may appoint," was held good. *Ib.* But a by-law enacting "that no person should expose for sale any meat, fish, poultry, eggs, butter, cheese, grain, hay, straw, cord-wood, shingles, lumber, flour, wool, meal, vegetables, or fruit (except wild fruit), hides or skins, within the town, at any place but the public market, without having first paid the market fee thereon as therein provided, except all hides and skins from animals slaughtered by the licensed butcher of the corporation, holding a stall in the market," was held bad. *Fennell and the Corporation of the Town of Guelph, In re, 24 Upper Can. Q. B. 238.* Also, "that meat, fish, poultry, eggs, cheese, grain, hay, straw, cord-wood, shingles, lumber, flour, wool, meal, vegetables, or fruit (except wild fruit), should not be exposed for sale within the municipality, except in the market, before 12 o'clock, noon," was held bad as to the articles mentioned in italics. *Ib.* See *In re Snell and Belleville, 30 Upper Can. Q. B. 91; Harr. Munic. Man. 5th ed. 452, 457, and cases.*

<sup>1</sup> *Nightingale, In re, 11 Pick. (Mass.) 168 (1831).* In this case the ordinance of the city (Boston) provided "that no inhabitant of the city of Boston, or of any town in the vicinity thereof, not offering for sale the produce of his own farm, &c., should, without the permission of the clerk of Faneuil Hall market, be suffered to occupy any stand with cart, sleigh, or otherwise, for the purpose of vending commodities in either of the streets mentioned in the first section of this ordinance," &c. It was objected against this ordinance that it was void : 1. Because it was partial, not operating upon all the citizens of the State equally. 2. Because it was uncertain, the term "*vicinity*" being indefinite. And, 3. Because it was in restraint of trade. But neither of these objections was considered tenable. The validity of such an ordinance was again

§ 388 (321). **Power to Tax Marketmen must be Plainly Conferred.** — But authority to erect a market, and power “to regulate the general police,” and “to preserve the peace and good order of the city,” do not authorize the corporation to impose a *tax* for revenue purposes upon persons occupying market stands in *the streets*, or selling produce therein. Such a power must be plainly conferred or it will not be held to exist.<sup>1</sup>

§ 389 (322). **Power to Regulate is a Police Power.** — The right to *regulate markets* established by a city under its charter is one of municipal police. The city authorities may, if their action be not unreasonable, provide what articles shall or shall not be sold at the public markets, and may impose penalties on those who violate their ordinances. They may, for example, prohibit groceries and oysters from being sold at the public markets, and require oysters, which have a great tendency to putrefaction, to be sold at certain designated stands, and prevent their being sold elsewhere.<sup>2</sup>

§ 390 (323). **Inspection Ordinances.** — A municipal corporation, says Mr. Willcock, may regulate the manner of carrying on trade within a municipality so far as to prevent monopolies or the sale of unfit commodities, and to ensure proper conduct in those who

affirmed by the same court in *Commonwealth v. Rice*, 9 Met. (Mass.) 253 (1845). See this case also as to requisites in certain respects of complaints for the violation of such an ordinance, and as to what acts will be deemed to be violations.

In *Louisiana*, on the other hand, an ordinance imposing a tax upon every load of supplies carried to the public markets by persons not occupying stalls in the markets, was held to be void as being a tax for revenue and not in the exercise of the police power. *State v. Blaser*, 36 La. An. 363. See *supra*, sec. 319; note; *Shelton v. Mayor, &c., of Mobile*, 30 Ala. 540 (1857); *Wartman v. Philadelphia*, 33 Pa. St. 202 (1854). An ordinance forbade the sale of fresh meats except by persons licensed, but contained a proviso in favor of *farmers*, authorizing them to sell meats, the *produce of their own farms*. The evident object was considered to be to protect *licensed butchers*, and at the same time to allow farmers to come in and sell the produce of their own farms. It was held that an unlicensed *butcher* was not a

“*farmer*” within the meaning of the *proviso*, although the meats which he sold came from sheep fattened on his farm, if the farm was only a convenient appendage to his business as a butcher. *Rochester v. Pettinger*, 17 Wend. (N. Y.) 265 (1837); *St. Paul v. Traeger*, 25 Minn. 248 (1878), cited *supra*, sec. 386, note.

<sup>1</sup> *Kip v. Paterson*, 2 Dutch. (N. J.) 298 (1857). This power, it was said, would authorize “the renting of stalls in the market-house, and perhaps of even prohibiting sales in the public streets.” *Ib. per Elmer, J.*

<sup>2</sup> *Municipality v. Cutting*, 4 La. An. 335 (1849); *Morano v. New Orleans*, 2 La. 217. Power of city to vacate leases and stalls in public market, under ordinance reserving the right, see *City Council v. Goldsmith*, 2 Speers (S. C.) Law, 428. Occupant of city market failing to pay rent in advance, according to contract, held a tenant *at will*. *Dubuque v. Miller*, 11 Iowa, 583. Control over tenants. *Woelpper v. Philadelphia*, 38 Pa. St. 203.

practise it within their jurisdiction.<sup>1</sup> In general, it may be said that incorporated cities and larger towns in this country have conferred upon them the power to pass ordinances regulating, to a reasonable extent, the mode in which the traffic of the place shall be conducted; but they can exercise no powers in this respect not conferred.<sup>2</sup> Laws requiring articles to be inspected or weighed and measured before being sold are in the nature of police regulations, and are valid in the absence of special constitutional provisions. When reasonable in their nature, they are not regarded as being in restraint of trade.<sup>3</sup>

<sup>1</sup> Willc. Corp. 142, pl. 332.

<sup>2</sup> *Nightingale, In re*, 11 Pick. (Mass.) 168; *Stokes v. New York*, 14 Wend. (N. Y.) 87; *Raleigh v. Sorrell*, 1 Jones (N. C.) Law, 49; *Chicago v. Quimby*, 38 Ill. 274 (1858); *Howe v. Norris*, 12 Allen (Mass.), 82; *Libby v. Downey*, 5 Allen (Mass.), 299; *Collins v. Louisville*, 2 B. Mon. (Ky.), 134 (1841). Power to appoint measurers of wood, and affix a reasonable allowance to them, does not justify the imposition of a tax for revenue. *Ib.* The legislature created a board of *railroad and warehouse commissioners* composed of three persons, appointed by the governor and confirmed by the senate for the term of two years, and empowered them to fix the rate of charges for the inspection of grain in cities. The court sustained this legislation. It regarded the board as a *quasi* public corporation, and held that it was competent for the legislature to delegate the power of inspection to it, instead of to the corporate authorities of the city of Chicago, and that the official bond of such inspector was a valid obligation against him and his sureties. *People v. Harper*, 91 Ill. 357 (1878), distinguishing it from *People v. Salomon*, 51 Ill. 50, and other cases holding, under the Constitution of Illinois, that local and municipal taxation can only be imposed by the local "corporate authorities."

<sup>3</sup> *Cooley Const. Lim.* 596; *Raleigh v. Sorrell*, *supra*; *Stokes v. New York*, *supra*; *Paige v. Fazackerly*, 36 Barb. (N. Y.) 392; *Mayor, &c. of New York v. Nichols*, 4 Hill (N. Y.), 209 (1843); compare *Mayor v. Hyatt*, 3 E. D. Smith (N. Y.), 156; *Rogers v. Jones*, 1 Wend.

(N. Y.) 237; *Yates v. Milwaukee*, 12 Wis. 673. The system of *inspection laws*, and the hosts of officers which they engendered, were considered by the constitutional convention of *New York* to entail annoyances and burdens upon the community sufficient to outweigh any benefits resulting from them; and the Constitution of 1846 (art. V. sec. viii.) abolished all such offices and forbade the legislature to re-create them, in this language: "All offices for the weighing, measuring, culling, or inspecting of any merchandise, produce, manufacture, or commodity whatever, are hereby abolished, and no such offices shall hereafter be created by law." See *Tinkham v. Tapscott*, 17 N. Y. 144, 147 (1858), where the origin, scope, and purpose of this provision are very satisfactorily discussed by *Denio, J.* In *Illinois* it is held that inspection power conferred upon a board of trade, to be exercised when requested by its members, may co-exist with like power in the city authorities, to be exercised in all cases when requested. *Chicago v. Quimby*, 38 Ill. 274 (1858).

The following cases are referred to as showing the solicitude of the law to preserve the public health; but in this country the power of municipal corporations in this respect depends on their charters or other legislative provision.

Knowingly to expose for sale in a public market meat which is not fit for human food is indictable. *Regina v. Stevenson*, 3 F. & F. 106. So knowingly taking unfit meat to public market for sale. *The Queen v. Jarvis*, 3 F. & F. 108. But in either event the knowledge of the unfitness of the food is essential to the creation

§ 391 (324). **Weighing.** — Power to a city “to regulate the public market, and to pass such other ordinances as shall seem meet for the improvement and good government of the city,” authorizes an ordinance *requiring oats, hay, &c., to be weighed by the public weigh-master* before being offered for sale, and imposing a penalty for its violation.<sup>1</sup>

§ 392 (325). **Same subject.** — A grant to the common council of “all powers, rights, &c., incident to municipal corporations and necessary to the proper government of the same,” might authorize a city to *prevent the sale of bread made out of unwholesome flour*, and, as a consequence, to provide for its inspection, but it would not give the power to regulate the assize, that is, the weight and price of bread, for the latter is a power not absolutely necessary for the proper government of a city. Power, however, to a city, “to regulate everything which relates to bakers,” does authorize an ordinance regulating the weight, size, and, it seems, the price, of bread, and the forfeiture of bread illegally baked; and such an ordinance, it has been held, is not in violation of any provision of the Constitution of Louisiana.<sup>2</sup>

§ 393 (326). **Police Regulations respecting the Public Peace and Safety; Use of Streets.** — Our city governments usually possess the

of the offence. *Regina v. Crawley*, 3 F. & F. 109. The offence is a nuisance at common law. *Shillito v. Thompson*, L. R. 1 Q. B. Div. 12. Each single act of exposure of tainted meat is a distinct offence. *Hartley, In re*, 31 L. J. M. C. 232. A salesman who sells in a public market meat which is afterwards found to be unfit for human food, but which he has no means of knowing or reason to suspect was other than good and wholesome meat, is not liable to an action upon an implied warranty or for money had and received. *Emmerton v. Mathews*, 7 H. & N. 586; but a person who sends animals destined for human food to a public market for sale impliedly represents that they are, so far as he knows, not infected with any contagious disease dangerous to life or health.

<sup>1</sup> *Raleigh v. Sorrell*, 1 Jones (N. C.) Law, 49 (1853); approving *Nightingale's Case*, 11 Pick. (Mass.) 168; *Stokes v. Corporation of New York*, 14 Wend. (N. Y.) 87. This power was also held to authorize the creation of the office of weighmaster

and the payment of his salary. 1 Jones, 49, *supra*. Construction of ordinance as to weighing hay on public scales. *Gass v. Greenville*, 4 Sneed (Tenn.), 62; *Yates v. Milwaukee*, 12 Wis. 752. Construction of statute as to mode of measuring grain. *Frazier v. Warfield*, 13 Md. 279. Of ordinance as to survey of lumber before sale. *Briggs v. Boat*, 7 Allen (Mass.), 287. An ordinance requiring that every person selling meat or articles of provision by retail, whether by weight, count, or measure, should provide himself with scales, weights, and measures, but that no spring balance, spring scale, spring steelyards, or spring weighing machine should be used for any market purpose, was held valid. *Snell and Belleville, In re*, 30 Upper Can. Q. B. 81.

<sup>2</sup> *Guillotte v. New Orleans*, 12 La. An. 432 (1857); *Paige v. Fazackerly*, 36 Barb. (N. Y.) 392. But as to forfeiture, *quære*, in absence of express power, and see *Phillips v. Allen*, 41 Pa. St. 481; *Mobile v. Yuille*, 3 Ala. 139.



power, either by express grant or by virtue of their authority, to make by-laws relating to the public safety and good order of the inhabitants, to regulate the rate of *speed of travel in the public streets*; the route or streets over which omnibuses, stage coaches, drays, &c., may run; the time of day in which the streets may be used for certain purposes; to interdict stoppages in the street to the delay of others; to exclude vehicles of all kinds from entering upon or passing over the sidewalks, &c. The public safety and convenience may require regulations of this character; but they must not, unless made by virtue of specific authority, be unreasonable or improperly in restraint of trade.<sup>1</sup> Power to make by-

<sup>1</sup> *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562 (1848), where the subject of the power of cities over streets, particularly in reference to omnibuses, is fully considered by Mr. Justice *Dewey*; *Commonwealth v. Robertson*, 5 Cush. (Mass.) 438 (1850), as to stoppages in streets contrary to ordinance; *Baker v. City of Boston*, 12 Pick. (Mass.) 184 (1831); *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349; *Ib.* 385; *Austin v. Murray*, 16 Pick. (Mass.) 126; *St. Paul v. Smith*, 27 Minn. 364. A regulation or ordinance *prohibiting the stoppage of vehicles in a public street for a longer time than twenty minutes* is a valid police regulation. *Commonwealth v. Brooks*, 109 Mass. 355; *Commonwealth v. Fenton*, 139 Mass. 195. The license of a hawker or peddler does not authorize him to violate such an ordinance. *Commonwealth v. Fenton, supra*; *Commonwealth v. Lagorio*, 141 Mass. 81. Power to a city "to regulate the running of railroad cars" authorizes the adoption of an ordinance prohibiting the propulsion of cars by steam within the corporate limits. *Buffalo & N. F. R. Co. v. Buffalo*, 5 Hill (N. Y.), 209 (1843).

Power to the city of Richmond to make "ordinances, not contrary to the Constitution and laws of the State, as shall be thought necessary for the good ordering and government" of its inhabitants, was considered by the Supreme Court of the United States to imply the power to ordain and establish suitable police regulations, and that includes the power to prohibit the use of locomotive engines propelled by steam on the public streets, when such action does not inter-

fere with any vested rights; and legislative authority to a specified railway company to construct its road "from some point within the corporation of Richmond to be approved by the common council," does not give it a vested right to the use of a particular street free from municipal control, when the city, in consenting to such use, reserved its chartered powers in that behalf. *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521 (1877). Special charter construed to authorize an ordinance for filling a street, although it is covered by a plank road laid under special legislative authority. *State v. Jersey City*, 2 Dutch. (N. J.) 444; *post*, chapter on Streets, sec. 713. In *Napman v. People*, 19 Mich. 352 (1869), a lawful arrangement between a railroad company and an omnibus company as to the delivery of passengers was held to be beyond municipal interference. Cities having exclusive control of streets may take such precautions as are necessary for the safety of their inhabitants in the use of them, as by erecting gates at railroad crossings or by permitting the railroad company to erect them. *Textor v. Baltimore & O. R. R. Co.*, 59 Md. 63.

Charter power to a municipal corporation to require railroad companies to fence their respective railroads within the municipal limits, to keep flagmen at street crossings, and to provide protection against injury to persons and property in the use of such railroads, confers plenary police powers over railroads within the corporate limits to provide protection against injuries to person and property; and the grant of a right of way to a railroad company by

laws for "the good rule and government" of the borough (*ante*, sec. 337), has reference to the government of the borough as a corporation, and the making of regulations for carrying into effect the purposes for which it was incorporated. (*Post*, sec. 408.) General powers of this character, without more, do not enable a town council to carry out any unreasonable ideas of general good government, and to impose penalties for the doing of things which are not prohibited by any public statute, nor by the common law.<sup>1</sup>

§ 394 (327). **Same subject. Salutary By-Laws.** — Under a general power to make "needful and salutary by-laws," a city ordinance of Boston, requiring the tenant or occupant, or, in case there shall be no tenant, the owners of buildings bordering on *certain streets, to clear the snow from the sidewalks adjoining their respective buildings*, is reasonable and valid. It was objected against this ordinance that it violated the fundamental maxim that all burdens and

an ordinance which provides that the company shall erect suitable fences, &c., is not a mere contract, but is an exercise of the right of municipal legislation, and as such has the force of law within the corporate limits. *Hayes v. Michigan Central R. R. Co.*, 111 U. S. 228 (1883). The duty thus devolved on the railroad is one due, not to the city as a municipal body, but to the public considered as composed of individuals, and each person specially injured by breach of the obligation is entitled to his individual compensation, and to an action for its recovery. *Id.* and cases cited.

A by-law prohibiting *rapid driving in the streets of a city* by carters and others is not in restraint of trade, and is reasonable and valid; and in a prosecution for its violation, it is not necessary to prove that any individual was actually endangered by the fast driving. As the mayor and aldermen have no authority to give a person permission to violate an ordinance, evidence of such permission, as well as evidence of the defendant's general character as a careful driver, is inadmissible. *Commonwealth v. Worcester*, 3 Pick. (Mass.) 462 (1826); *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 570 (1848); *Washington v. Nashville*, 1 Swan (Tenn.), 177. Commented on. *McBean v. Chandler*, 9 Heisk. (Tenn.) 349 (1872); *post*,

chapter on Streets, sec. 713. Where an intent to injure is not made an essential ingredient of the offence of rapid driving under the ordinance the intent necessary to a criminal assault and battery is not supplied by a mere intent to violate the ordinance. *Commonwealth v. Adams*, 114 Mass. 323; s. c. 19 Am. Rep. 362.

An ordinance prohibiting "night-walking" is not "class legislation" but a proper police regulation. *Braddy v. Milledgeville*, 74 Ga. 516.

There is no obligation, in the absence of a valid municipal by-law or statute, on the part of people to keep *roofs clear of snow*, or to detain the snow so that it cannot slide into the street, though there may be, it seems, such a faulty construction of roof as, on proof thereof, would involve a liability on the part of the owner or occupier for accidents. *Lazarus v. Toronto*, 19 Upper Can. Q. B. 13, *per Robinson*, C. J. Power to local board to provide for the removal of "dirt, ashes, rubbish, filth, dung, and soil" does not authorize a by-law for the removal of snow. *Reg. v. Wood*, 5 E. & B. 49. *Infra*, sec. 394, note. See *post*, chap. xxiii.

<sup>1</sup> *Addison on Torts*, 34; *Rex v. Westwood*, 4 B. & C. 781; *Reg. v. Wood*, 5 Ell. & Bl. 55; *post*, secs. 396, 408.

taxes laid upon the people for the public good shall be equal. The objection was overruled. And it was justly regarded by the court as in the nature of a police regulation, requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely built city, and imposed upon the persons named because they are so situated that they can promptly and conveniently perform it; and it is laid not upon a few, but upon a numerous class, and equally upon all who are within the description composing the class and who commonly derive a peculiar benefit from the duty required. It would doubtless be otherwise if the ordinance arbitrarily imposed this duty upon the mechanics or merchants, or any other class of citizens between whose convenience and the labor required there is no natural relation.<sup>1</sup>

§ 395 (328). **Same subject.** — The power to make "salutary by-laws" with respect to the use of streets, will, it seems, authorize a city to pass by-laws regulating the *removal of buildings* and the temporary use of the streets and highways for that purpose.<sup>2</sup>

§ 396 (329). **Ordinances under Police Power and General Welfare Clause.** — Other illustrations of what a municipal corporation may do *under the general welfare clause* in its organic act, or *under its police power* or its implied right to pass by-laws, or under a general grant of authority for that purpose, may be here given.

Under authority "to ordain and publish such acts, laws, and regulations, not inconsistent with the Constitution and laws of the

<sup>1</sup> Goddard, *In re*, 16 Pick. (Mass.) 504 (1835); Union Railway Co. v. Cambridge, 11 Allen (Mass.), 287; Kirby v. Boylston Market Assoc., 14 Gray (Mass.), 252; *post*, chap. xxiii., note and cases cited. The same power held to authorize an ordinance to prevent the placing of show boards and signs upon the side-walks so as to obstruct them, and also to prevent the carrying of placards and signs on the sidewalk for the purpose of displaying them. As the tendency of this is to collect crowds and thus to interfere with the use of the side-walks by the public, such an ordinance is not unreasonable. Commonwealth v. McCafferty, 145 Mass. 384 (1888).

In *Illinois* it is held that a city has no power by ordinance to compel an abutter, under penalty, to remove the snow from the sidewalk within a certain time. He has no more interest in such removal

than any other citizen. Gridley v. Bloomington, 88 Ill. 554; *supra*, sec. 393, note.

An ordinance requiring personal labor upon streets, or, in lieu thereof, payment of a specified sum, held valid; held also that labor so required is not "involuntary servitude" within the meaning of the Constitution of Kansas or of the United States. *In re Dassler*, 35 Kan. 678.

<sup>2</sup> Day v. Green, 4 Cush. (Mass.) 433, 437, *per Shaw*, C. J. And where such a by-law prohibits the moving without a license granted by the mayor and aldermen, a license granted by the mayor is void, even though the board of aldermen, by a vote, had previously undertaken to delegate the power to grant such license to the mayor alone. The by-law contemplates that the mayor and aldermen should act unitedly as one body. *Id.*

State, as shall be needful to the *good order* of the city," it can, says Howard, J., "subject to these restrictions and certain statute regulations, establish all suitable ordinances for administering the government of the city, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits, and for the performance of the general duties required by law of municipal corporations."<sup>1</sup>

§ 397 (330). **Same subject.\* Observance of the Sabbath.**—Power to pass such ordinances "to maintain the peace, good government, and order of the city, and the trade, commerce, and manufactures thereof, as the council may deem expedient, not repugnant to the Constitution and laws of the State," authorizes an ordinance prohibiting the *keeping open of stores, shops, and places of business on Sunday*, if its provisions do not conflict with State legislation.<sup>2</sup> But

<sup>1</sup> *Per Howard, J.*, *State v. Merrill*, 37 Me. (2 Heath) 329 (1853). Such would undoubtedly be the proper construction if this were the only power given to the city to pass ordinances or by-laws. It should then be somewhat liberally construed. But if such a general grant is given in connection with, or at the end of, a long list of specific powers, perhaps so extended a construction might not then be due to it. The power conferred by the general welfare clause is restricted by reference to other provisions of the charter or constituent act. *Montgomery City Council v. Montgomery & W. Pl. R. Co.*, 31 Ala. 76 (1857); *Mount Pleasant v. Breeze*, 11 Iowa, 399, 400 (1860), *per Wright, J.* Under the general welfare clause a city may require sellers of meat, &c., to take out licenses. *Kinsley v. Chicago*, 124 Ill. 359 (1888). The general welfare clause has been held to confer power to prevent the keeping of *bawdy-houses*. *State v. Williams*, 11 S. C. 288. See *ante*, secs. 376, 393; *post*, secs. 432-436.

A city government under the usual grants of power has the general authority to so regulate the use and enjoyment of private property in the city as to prevent its proving pernicious to the citizens generally, and may, when the use to which the owner devotes his property becomes a *nuisance*, compel him to cease so to use it, and punish him for refusing to obey its ordinances and regulations concerning

such use. *Louisville City Railway Co. v. Louisville*, 8 Bush (Ky.), 415 (1871).

The statute of *California*, authorizing supervisors of San Francisco "to make all regulations which may be necessary or expedient for the preservation of the public health," is within the constitutional power of the legislature to enact; and under it the supervisors may pass an ordinance against *feeding cows on distillery slops*, and vending the milk of cows thus fed. *Johnson v. Simonton*, 43 Cal. 242 (1872); *ante*, secs. 141, 144, 369, 374, 379.

A common council has power to adopt a penal ordinance requiring auctioneers to procure licenses from the city. This power is in the nature of a police regulation. *Goshen v. Kern*, 63 Ind. 468; *Kinsley v. Chicago*, 124 Ill. 359 (1888). See further, *Index*, title *License*.

<sup>2</sup> *St. Louis v. Cafferata*, 24 Mo. 94 (1856); see *State v. Cowan*, 29 Mo. 330; *State v. Ambs* (constitutionality of Sunday laws affirmed), 20 Mo. 214; *s. f.* *Frolickstein v. Mobile*, 40 Ala. 725 (1867); *Hudson v. Geary*, 4 R. I. 485 (1857); *Specht v. Commonwealth*, 8 Pa. St. 312; *Cincinnati v. Rice*, 15 Ohio, 225; *Karwisch v. Atlanta*, 44 Ga. 204 (1871); *McPherson v. Chebanse*, 114 Ill. 46. In the case of the *City Council v. Benjamin*, 2 Strob. (S. C.) Law, 508 (1846), it was decided by the Court of Appeals of *South Carolina* that an ordinance of the city of Charleston, prohibiting "public exposures for sales,

the general welfare clause does not authorize a city to construct, or aid in constructing, a *plank road or toll bridge* built by a private company beyond the corporate limits of the city.<sup>1</sup>

§ 398 (331). **Limitation of Power under the General Welfare Clause.** — The general welfare clause to pass ordinances for the good government, &c., of the corporation does not authorize an ordinance requiring the *proprietor of a theatre*, circus, or other exhibition licensed by the corporation, to *pay a peace or police officer* of the place two dollars, or any sum, for each night's attendance upon such place for the purpose of enforcing order. Such an ordinance is unreasonable, and can only be passed when clearly authorized.<sup>2</sup> Under such a clause an ordinance subjecting to a fine "any person whose known character is that of a prostitute," was held to be unlawful.<sup>3</sup>

§ 399 (332). **Good Order Clause; Trees in Streets.** — Where a city corporation is authorized "to ordain such laws not inconsistent with the Constitution and laws of the State as shall be needful to the *good order* of the city," it may pass an ordinance imposing a penalty upon any person who shall "mutilate or *destroy any ornamental tree planted in any of the streets*, lanes, or other public places within the limits of the city." Such an ordinance is not inconsistent with a State law punishing the *malicious or wanton* destruction of trees

or sales of merchandise, on Sunday," was not a violation of that section of the State Constitution which declares that "the free exercise and enjoyment of religious profession or worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind." In that case the defendant was a Jew, and the city was not denied to be possessed of all the power on the subject which the legislature could constitutionally bestow. In the case of *Columbia v. Duke and Marks*, cited 2 Strob. 530, and approved, a similar decision was made at *nisi prius* by Mr. Justice *Martin*. And in this last case it was further ruled, that power in the charter to "establish such by-laws as may tend to the quiet, peace, safety, and good order of the inhabitants," authorized the passage of such an ordinance. Under "full power to pass such ordinances as the city council shall deem expedient for the government of the city, not contrary to the Constitution of the State or the United States," a city may prohibit, within its

limits, the sale of liquor on Sunday. *Megowan v. Commonwealth*, 2 Met. (Ky.) 3 (1859); *State v. Welch*, 36 Conn. 215 (1869). In *Shreveport (city of) v. Levy*, 26 La. An. 671 (1874); s. c. 21 Am. Rep. 553, an ordinance forbidding the sale of goods on Sunday, but excepting those persons keeping their places closed on Saturday, was held to be unconstitutional as giving to Jews a privilege denied to others. Power to make rules for the good order and public peace of a city held to imply power to *appoint policemen*. *State v. Sims*, 16 S. C. 486. A mere power to "secure the health, peace, and improvement of the city" held not to authorize an ordinance prohibiting the keeping open of stores on Sunday. *Corvallis v. Carlile*, 10 Oreg. 139.

<sup>1</sup> *Montgomery City Council v. Montgomery & W. Pl. R. Co.*, 31 Ala. 76 (1857); *ante*, sec. 161.

<sup>2</sup> *Waters v. Leech*, 3 Ark. 110 (1840); *supra*, sec. 319; *post*, sec. 663.

<sup>3</sup> *Buell v. State*, 45 Ark. 336.

growing for ornament or use. Under the ordinance it is not necessary to allege or prove that the mutilation was malicious or wanton, and it would seem to be considered that it was no defence that the tree alleged to be mutilated was upon the street in front of the lot of the accused, who owned, subject to the public easement, *ad medium filum viæ*.<sup>1</sup>

§ 400 (333). **Regulation of Saloons, &c., under General Welfare Clause.**—Under a general power<sup>1</sup> to pass “any other by-laws for the well-being of the city,” its council may, by ordinance, prohibit saloons, restaurants, and other places of public entertainment, to be *kept open after ten o'clock at night*. The objections that such a by-law was unreasonable, and deprived the citizen of the constitutional right of “acquiring property,” were not considered to be well taken. It regulates, but does not deprive the party of his rights.<sup>2</sup> Under similar powers an ordinance confining the carrying on of the laundry business to a certain portion of a city, is a police regulation and reasonable.<sup>3</sup>

§ 401 (334). **Powers under Authority to regulate the Police.**—Power “to regulate the police of the city,” and to pass ordinances not inconsistent with law, authorizes an ordinance for *arresting and fining vagrants*, although, by the general law of the State, vagrants may be proceeded against before a justice of the peace, the court considering that this did not forbid the corporation to make a local regulation on the same subject not in conflict with the general law.<sup>4</sup>

<sup>1</sup> State v. Merrill, 37 Me. (2 Heath) 329 (1853). *Contra*, as to right of adjoining owner. Lancaster v. Richardson, 4 Lansing (N. Y.), 136 (1871); see *post*, sec. 663, note. The case in *Maine* is a quite liberal construction of the words “good order.” But it is necessary that cities should have such an authority, and the power to pass the ordinance could, perhaps, be sustained as incidental to the power of the city over its streets and public places. *Post*, chapter on Streets. Further as to shade trees. *Post*, sec. 663, note.

<sup>2</sup> The State v. Freeman, 38 N. H. 426 (1859); following and approving on this point, State v. Clark, 8 Fost. (28 N. H.) 176; Morris v. Rome City Council, 10 Ga. 532; Hudson v. Geary, 4 R. I. 485. “It is an unavoidable consequence of city ordinances, that they in some degree in-

terfere with the unlimited exercise of private rights.” *Per Bell, J.*, in State v. Freeman, 38 N. H. 428; State v. Welch, 36 Conn. 215 (1869). In further support of text, Platteville v. Bell, 43 Wis. 488 (1878); Staats v. Washington, 45 N. J. L. (16 Vroom) 318; Staates v. Washington, 44 N. J. L. (15 Vroom) 605.

<sup>3</sup> Matter of Hang Kie, 69 Cal. 149; see Index, tit. *Laundry*.

<sup>4</sup> St. Louis v. Bentz, 11 Mo. 61 (1857); distinguished from Jefferson City v. Courtmire, 9 Mo. 692, which was a summary proceeding for an indictable offence. See State v. Cowan, 29 Mo. 330; St. Louis v. Schoenbush, (Mo.) 8 S. W. Rep. 791; s. c. 95 Mo. 618 (1888); Byers v. Commonwealth, 42 Pa. St. 89, *per Strong, J.*; Shafer v. Mumma, 17 Md. 331 (1861); *supra*, sec. 440; *post*, sec. 427, note.

§ 402 (335). **Same subject.** — By virtue of its police power a municipal corporation may pass an ordinance imposing a fine upon the owner of any *animal found astray or at large* within the limits of the corporation.<sup>1</sup>

§ 403 (336). **Power under Authority to preserve Good Order, &c.** — If a municipal corporation has, by its charter, power to pass ordinances to preserve the peace and good order of the place, this gives it authority to provide for the punishment, in the manner allowed by its charter, of persons who shall rescue, or attempt to *rescue prisoners* from the lawful custody of municipal officers.<sup>2</sup> But the general power, though expressly conferred, to enact by-laws for the good government of the town, does not confer the power to *levy taxes* of any kind, not even upon retailers of ardent spirits.<sup>3</sup>

A statute by which "two or more overseers of the town" were authorized to commit to the workhouse, until discharged by law, by writing under their hands, to be there employed and governed according to the rules and orders of the house, &c., "all persons, able of body to work, and not having estate or means otherwise to maintain themselves, who refuse or neglect to do so, live a dissolute, vagrant life, and exercise no ordinary calling or lawful business sufficient to gain an honest livelihood," does not violate the constitutional right to "life and liberty," or the right, in "criminal proceedings, to be heard by counsel, confronted with witnesses," &c. The court did not regard it as a criminal proceeding, but as a reformatory or correctional one, so far as the person proceeded against was concerned, and designed to protect the community from becoming chargeable with the person's support. *Nott's Case*, 11 Me. (2 Fairf.) 208 (1834); *s. p.* *Portland v. Bangor*, 42 Me. 403 (1856), *Rice, J.*, dissenting. It is now admitted by the Supreme Court of *Maine* that this statute is in conflict with the 14th amendment of the Constitution, "That no State shall deprive any person of life, liberty," &c., "without due process of law," and that *Nott's Case* and *Portland v. Bangor*, *supra*, are no longer the law. Now there can be no restraint of liberty without first having a judicial investigation of the charge.

*Portland v. Bangor*, 65 Me. 120 (1876); *s. c.* 20 Am. Rep. 681. See *Byers v. Commonwealth*, 42 Pa. St. 89; *post*, sec. 427, note, sec. 433. In a late case in *Illinois*, the Supreme Court of that State decided that the act creating the Reform School was unconstitutional, and that the act, so far as it restrained liberty for any cause except actual crime, was in violation of the Bill of Rights. *People v. Turner*, 10 Am. Law Reg. (N. S.) 366, and approving note of Judge *Redfield*; *s. c.* 55 Ill. 280; *People v. Weissenbach* (power to bind out children), 60 N. Y. 385.

<sup>1</sup> *Municipality v. Blanc*, 1 La. An. 385 (1846); *Case v. Hall*, 21 Ill. 632; *Commonwealth v. Bean*, 14 Gray (Mass.), 52; *Commonwealth v. Curtis*, 9 Allen (Mass.), 266; *Roberts v. Ogle*, 30 Ill. 459; *McKee v. McKee*, 8 B. Mon. (Ky.) 433 (1848); *Waco v. Powell* (hogs at large), 32 Texas, 258 (1869); *Cartersville v. Lanham*, 67 Ga. 753; *ante*, sec. 321, note; *supra*, sec. 348. Construction of ordinance prohibiting the *suffering* of animals to run at large, and what must be shown to subject a person to liability under such an ordinance. *Collinsville v. Scanland*, 58 Ill. 221 (1871); *Kinder v. Gillespie*, 63 Ill. 88 (1872).

<sup>2</sup> *Independence v. Moore*, 32 Mo. 392 (1862); *St. Louis v. Schoenbush*, 95 Mo. 618 (1888).

<sup>3</sup> *Comm'rs of Ashville v. Means*, 7 Ire. (N. C. Law) 406 (1847); *Burnett, In re*, 30 Ala. 461 (1857); *post*, chap. xix.

§ 404 (337). **General Welfare Clause continued.** — The general welfare clause, in a charter empowering the city council to pass such other ordinances as appear necessary for the *security* of the city, authorizes an ordinance regulating the *mode of keeping and the sale of gunpowder*, within the limits of the corporation, such as requiring all gunpowder brought into the city to be conveyed to the public magazine of the city, except when it is to be retailed, and then to be kept in limited quantities and in secure canisters. And it was so held, notwithstanding the point was made in argument that the general welfare clause in the charter could not enlarge the powers of the corporation further than is necessary to carry into effect the specific grants of power.<sup>1</sup>

§ 405 (338). **Public Safety; Fire Limits.** — Municipal corporations, with general power to provide for the safety of their inhabitants, may prohibit the throwing of heavy or *dangerous articles* from the upper stories of buildings *into the streets* or open spaces near them, where persons are in the habit of passing; and may, where this is consistent with the general and special legislation applicable to the municipality, establish *fire limits*, and prevent erection therein of *wooden buildings*.<sup>2</sup>

<sup>1</sup> Williams v. Augusta City Council, 4 Ga. 509 (1848); Frederick v. Augusta City Council, 5 Ga. 561, where the charter of Augusta is more fully given.

In *California* it has been held that, under such a power, a municipality may prohibit the carrying on of a laundry within the city limits in any building not constructed of brick or stone. Matter of Yick Wo, 68 Cal. 294; and in *Missouri* a city may, under the general welfare clause, prohibit *cruelty to animals*. St. Louis v. Schoenbusch, 95 Mo. 618 (1888).

<sup>2</sup> City Council v. Elford, 1 McMullan, (S. C.), Law, 234 (1841); Brady v. N. W. Insurance Co., 11 Mich. 425; Douglass v. Commonwealth, 2 Rawle (Pa.), 262; Wadleigh v. Gilman, 12 Me. 403; Vanderbilt v. Adams, 7 Cow. (N. Y.) 349, 352, per Woodruff, J., *arguendo*. Charleston v. Reed, 27 W. Va. 681, quoting text; King v. Davenport, 98 Ill. 305; Baumgartner v. Hasty, 100 Ind. 575; Klingler v. Bickel, 117 Pa. St. 326; Knoxville v. Bird, 12 Lea, 121; holding also that the exercise of this power does not "impair the obligation of a contract," where a con-

tract to build was made before the passage of the ordinance. In Pye v. Peterson, 45 Tex. 312 (1876); s. c. 23 Am. Rep. 608, the conclusion was reached in view of the legislation of the State that a general grant of power to a city "to ordain such ordinances, not inconsistent with the laws of the State, as shall be needful for the government, interests, welfare, and good order of the corporation," did not authorize the city to establish fire limits and to prevent the erection of wooden buildings within such limits. The text is referred to, and it is admitted that it is supported by Wadleigh v. Gilman, and, on the other hand, the Mayor of Hudson v. Thorne is considered as opposed to it. Of course the question in each case must be decided in view of all the legislation of the State bearing upon it. The text in this edition has been slightly modified. The prevention of fires in towns and cities is peculiarly a matter for local regulation, and is universally so regarded. *Ante*, secs. 141, 143. It belongs to the ordinary police powers of a city; and unless such a course is inconsistent with the legislation of the



§ 406 (339). **Public Safety ; Hoistways.**— Under authority to make police regulations, or to pass by-laws for the good rule and

State touching the subject (as Mr. Justice *Gould* shows it to have been in *Texas*), it seems to us to be presumptively authorized by a general grant of power to provide for the safety and welfare of the inhabitants.

A power to establish fire limits should be strictly construed in favor of the owners of buildings which are subject to be removed. *Louisville v. Webster*, 108 Ill. 414.

An ordinance establishing fire limits is not in violation of the *Fourteenth Amendment* to the United States Constitution ; nor is it oppressive, unreasonable, or special in its operation ; it is not an unwarrantable delegation of power to municipal officers. *Ex parte Fiske*, 72 Cal. 125. An ordinance prohibiting the erection of wooden buildings within prescribed limits does not violate either the Constitution of Pennsylvania or the *Fourteenth Amendment* to the Constitution of the United States. *Klingler v. Bickel*, 117 Pa. St. 326. In an action of trespass the officers of a city may justify the demolition of a wooden building in course of construction in violation of the ordinance. *Ibid.*, distinguishing *Fields v. Stokley*, 99 Pa. St. 306.

A court of equity will not enjoin the erection of a wooden building within the fire limits although such erection is forbidden by ordinance. *St. Johns (village of) v. McFarlan*, 33 Mich. 72 (1875) ; s. c. 20 Am. Rep. 671. *Marston*, J. says : " A court of chancery has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done, if carried out, will be a nuisance. . . . If a proper ordinance was framed with an appropriate penalty, we think the remedy at law would be found adequate." Compare *City Council v. Louisville & C. R. R. Co. (Ala.)*, 4 Southern Rep. 626 ; see *Forcheimer v. Port of Mobile (Ala.)*, *Id.* 112.

Whether the municipality may resort to equity to aid it in enforcing its public duties : Equity will not enjoin, at the instance of the municipality itself, even where the ordinance directs such a suit to

be brought against any person about to erect a wooden building contrary to its provisions. *Waupun v. Moore*, 34 Wis. 450 (1874) ; s. c. 17 Am. Rep. 446. *Lyon*, J., says that " equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation, restraining an act, unless the act is shown to be a nuisance *per se*. High on Injunct. sec. 788 ; *Hudson v. Thorne*, 7 Paige, 261 ; *Phillips v. Allen*, 41 Pa. St. 481."

In *Massachusetts*, on the other hand, a city or town is held entitled to maintain a bill in equity to prevent the carrying on of trades or occupations therein which are intrinsically nuisances, contrary to the regulations which the town or city, by delegated authority from the legislature, is authorized to make. *Winthrop v. Farrar (offensive trade)*, 11 Allen (Mass.), 398. So where a statute prohibited the use, in cities and towns of a specified size, of any building not then so in use, for carrying on the business of " slaughtering cattle," &c., without the permission of the municipal or town authorities, it was held that the act was constitutional as an exercise of the police power, and that the town or city might, in the corporate name, file a bill in equity to restrain the use of a building therein for the prohibited purpose, where the required consent of the local authorities had not been obtained. *Watertown v. Mayo*, 109 Mass. 305 (1872) ; s. c. 12 Am. Rep. 694. No solid reason, in the author's judgment, exists, why, in proper cases, a municipal corporation may not resort to a court of equity to aid it in enforcing its public duties to preserve the health and property of the inhabitants ; and by proper cases is meant those which fall within some recognized head of equity jurisdiction. *Ante*, sec. 375, note.

In *Connecticut*, where the city charter authorized the common council of a city to make ordinances to protect a city from fire, and to establish districts within which it should not be lawful without a license to erect, enlarge, or place any wooden building, the council passed an ordinance establishing a fire district and

government of the corporation, it has the power to require hoistways inside of stores (usually places of public resort) to be enclosed by a

forbidding the erection or placing of any wooden building therein, without license given by the board of aldermen, declaring that such building should be deemed a common nuisance, and making it the duty of certain officers after reasonable notice, to abate it; and it was held that the ordinance was fully authorized by the charter and was reasonable. *Hine v. New Haven*, 40 Conn. 478 (1873). In the case of a building erected without license within the fire limits of a city in violation of such an ordinance, it is not sufficient reason for the interference of a court of equity by injunction, at the instance of the owner, that he had obtained the consent individually of a majority of the aldermen, notice being given him that the board when in session might refuse its assent, as it afterwards did; nor that he had, after placing the building, covered it with a sheathing of iron and tinned the roof, before proceedings were instituted against him, and had by further work upon it during the pendency of the proceedings made it substantially fire-proof. The city authorities were considered by the court to be the proper judges as to how far these facts should affect their action. The court expressed the further view that the prompt enforcement of an ordinance establishing fire limits in a city is important to the public safety, and a court of equity ought not to interfere, in a case like that before the court, by injunction to prevent such enforcement, but leave the party aggrieved to his legal remedy, if he is entitled to any remedy. Nor was it a reason for the interference of chancery that the building erected in such fire limits had become real estate, since it had become so by the unlawful act of the owner, and was such only in the most technical sense, and the value of the building could be easily ascertained and proved. *Id.* City enjoined at instance of owner from such an enforcement of fire limit ordinance as would violate the owner's legal rights. *City Council v. Louisville &c. R. R. Co.* (Ala.), 4 South Rep. 626. Compare *Dunham v. New Britain* (Conn.), 11 At. Rep. 354.

Where the ordinance passed under the authority above referred to provided that no person shall build or enlarge any building within the fire limits, without a license first issued by the fire marshal, for which a license fee of fifty cents was required to be paid, it was held that the license fee thus required was not a revenue tax, in any proper sense, but rather a reasonable sum collected of the party interested for the purpose of defraying in part the expense of issuing and recording the license, and that the power to require such a fee was conferred by the charter by intendment, as convenient, if not essential to full enjoyment of the powers expressly granted. *Welch v. Hotchkiss*, 39 Conn. 140 (1872).

As to license fee, see *ante*, secs. 357, 358; *Kinsley v. Chicago*, 124 Ill. 359 (1888), holding that a license fee may be exacted under a mere power to regulate a calling or business without express power of taxation. Such a fee is not illegal for being in excess of the necessary or probable expense of issuing the license and inspecting the business. In *Chicago v. Phoenix Ins. Co.*, 126 Ill. 276 (1888), it was held that an ordinance prohibiting foreign insurance companies from doing business in a city, without taking out a license which called for the payment of two per cent of their gross receipts from business done in the city, was not sustainable as an exercise of the police power granted to the city by its charter. *New Orleans v. Great South Tel. Co.*, 40 La. An. 41; *State v. Hilbert* (license fees on cars), 72 Wis. 184; s. c. 39 North West. Rep. 326. *Post*, chap. on Taxation.

Instance of a want of power to restrict erection of wooden buildings. *Hudson v. Thorne*, 7 Paige, 261; *Pye v. Peterson*, 4 Tex. 312; *Alexander v. Greenville T. C.*, 54 Miss. 659; approving text. Cities may constitutionally be authorized to prevent the erection of wooden buildings in certain portions thereof. *Respublica v. Duquet*, 2 Yeates (Pa.), 493. In *Wadleigh v. Gilman*, *supra*, it was decided that the removal of a wooden building to the prohibited district, or even from one part of the district

railing, and closed by a trap-door after business hours each day. It was justly regarded as a reasonable police regulation not unnecessarily interfering with private rights.<sup>1</sup>

§ 407 (340). **Preservation of Order.**—Power “to prevent disturbances and disorderly assemblages, and maintain the good government of the city,” authorizes it to take measures *to preserve the peace* and to protect the lives and property of the citizens, and the acts of the city in procuring a loan of arms and giving a bond for their return are valid and binding upon it.<sup>2</sup> Authority to preserve the peace and quiet of the place authorizes an ordinance forbidding

to another, was an “erection” within the meaning of the term “*erection*,” as used in the ordinance. “The mischief,” says *Weston*, C. J., “did not consist in the act of erecting, but in the continuance of the erection. The ordinance did not meddle with erections as they stood; this would have transcended their power.” Difference between “erecting” and “repairing.” *Brady v. N. W. Ins. Co.*, 11 Mich. 425, 449, opinion of *Campbell*, J.; *City Council v. Louisville &c. R. Co.* (Ala.), 4 South. Rep. 626; *Carroll v. Lynchburg* (Va.), 6 South. East. Rep. 133; *Brown v. Hunn*, 27 Conn. 332; *Booth v. State*, 4 Conn. 65; *Tuttle v. State*, 7b. 68; *Stewart v. Commonwealth*, 10 Watts (Pa.), 306. Remedy against wrong-doer, by private action in favor of an adjoining owner specially injured by a violation of a statute in relation to the erection of wooden buildings. *Aldrich v. Howard*, 7 R. I. 199. See Index—*Fire*. *Ante*, sec. 109. A municipal corporation has inherent power, independent of legislative grant, to forbid the erection within the densely built up parts of a town, and compel the removal therefrom, of buildings formed of combustible materials. *Monroe v. Hoffman*, 29 La. An. 651. An ordinance prohibiting the *erection or enlargement* of any building except with brick or stone; that no wooden building should be enlarged without a permit from the local authorities, was sustained. *McCloskey v. Kreling* (Cal.), 18 Pac. Rep. 433 (1888). A municipality is under no implied or common-law liability in damages for a loss caused by a fire originating in a wooden building erected and maintained in known violation of an ordi-

nance. *Hines v. Charlotte* (Mich.), 40 N. W. Rep. 333; *post*, chap. xxiii.

<sup>1</sup> Mayor, &c. of New York *v. Williams*, 15 N. Y. 502 (1859). *Johnson*, J., observes: “The danger is not confined to the owner and ordinary occupants of the building. The ordinance, in that respect, stands on the same footing as a regulation prohibiting a well or cistern in a man’s yard unprotected by curb or cover, the reasonableness of which could not be doubted. In case of fire, these openings would tend directly and powerfully to allow the fire to extend through all parts of the building, and if left uncovered, would also tend to endanger those whom duty might require to enter to effect the extinguishment of the fire.” *Paige*, J., considered the ordinance the same in principle as fire laws, prescribing the height, thickness of walls, and materials of buildings within the city.

<sup>2</sup> *State v. Buffalo*, 2 Hill (N. Y.), 434 (1842); *New Orleans v. Costello*, 14 La. An. 37. An ordinance against *disorderly conduct* has no reference to a simple trespass on a vacant lot, though committed in an attempt to assert an adverse right to the property. *Mobile v. Barton*, 47 Ala. 84 (1872). A municipal legislative body, empowered by law to prohibit or suppress practices against *good morals or public decency*, may, by ordinance, punish the utterance of *profane language*, whether uttered frequently or only once by the same person. The decision of the council that the use of profane language is against good morals will not be judicially reviewed. *Delaney, In re*, 43 Cal. 478 (1872).

"all disorderly shouting, dancing, &c., in the streets and public places," though such conduct violates no existing State law.<sup>1</sup>

*Mode of enforcing Ordinances.*

§ 408 (341). **In England; Civil Actions and Complaints.** — In the old corporations in England, by-laws were usually made in virtue of their implied power; they did not extend to matters criminal in their nature, and could only be enforced, unless by virtue of a statute or valid custom, by fines, or pecuniary penalties, commonly for a small sum, and always, or almost always, in a fixed or certain amount.<sup>2</sup> So, by the Municipal Corporations Act of 1835, the council are empowered to make such by-laws as to them shall seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not punishable by act of parliament in force in the borough, and to appoint such *fines* as they shall deem necessary for the prevention and suppression of such offences, with the proviso that no fines shall exceed the sum of five pounds.<sup>3</sup> The act provides that prosecutions for a breach of by-laws made under it shall be commenced within three months after the commission of the offence; that the charge shall be made on oath; that a summons shall issue and be served, with power to the magistrate to proceed without the appearance of the defendant, or to issue a warrant for his arrest; that if convicted, the penalty shall be paid, either immediately or within such period as the magistrate shall think fit; that it may be levied by distress and sale of the goods and chattels of the offender, and for want of sufficient distress the offender may be imprisoned for a term not exceeding one month; the imprisonment to cease upon payment of the sum due.<sup>4</sup> It is suggested that the remedy thus prescribed is cumulative, and will not debar the corporation from availing itself

<sup>1</sup> *Washington v. Frank*, 1 Jones (N. C.) Law, 436; *State v. Debnam*, 98 N. C. 712; *State v. Cainan*, 94 N. C. 880; construction of ordinance in respect to disturbing public peace. — *Charivari*, St. Charles v. Meyer, 58 Mo. 86. As to what regulations of this kind are necessary, "much," says the court, "must be left to the judgment and discretion" of the corporate authorities. *Washington v. Frank*, 1 Jones (N. C.) Law, 436; *ante*, sec. 319; *State v. Bill*, 13 Ire. (N. C. Law), 378; *post*, chap. xiii. Ordinance prohibiting the visiting of gambling houses

held valid. *Lane, ex parte*, 76 Cal. 587; s. c. 18 Pac. Rep. 677.

<sup>2</sup> *Gee v. Wilden*, Lutw. 1320, 1324; *Wood v. Searl*, J. Bridg. 139; *Piper v. Chappell*, 14 M. & W. 624; *Rawlinson on Corp.* 665, note. *Post*, sec. 424 *et seq.* See *post*, chapter on Municipal Courts, sects. 426, 427, 432 *et seq.*

<sup>3</sup> 5 and 6 Wm. IV., chap. lxxvi., sec. 90. *Ante*, sects. 35, 336, 337, 393; *post*, sec. 426.

<sup>4</sup> 5 and 6 Wm. IV., chap. lxxvi., sec. 139; sects. 187-193; *supra*, sec. 266.

of the usual common-law mode of enforcing a by-law by action of debt or *assumpsit*.<sup>1</sup> But the point seems not to have been yet adjudged.

§ 409 (342). **Same subject.** — Aside from statutory regulation, the general method of enforcing a by-law in England is, as just stated, by bringing, in the name of the proper party or corporation, an action, in the proper court, against the person who has violated the by-law, to *recover the penalty* which it imposes ; and this action may be either *debt or assumpsit*. By the common law, *assumpsit* may be maintained for the breach of any duty which the defendant has been legally liable to perform in favor of the plaintiff, the law implying a promise to perform the particular act, and hence no principle was violated in holding that *assumpsit* would lie to recover the penalty of a by-law. As the penalty was for a sum certain, and was considered to be in the nature of liquidated damages, an action of debt would also lie to recover the amount of the penalty ; but where the by-law itself provided that the penalty should be recovered by debt, then that form of action alone could be maintained. But, aside from statute authority or a valid custom, it was not competent for the by-law to provide that its penalty should be recovered by "distress and sale" of goods, that being contrary to the common law.<sup>2</sup>

§ 410 (343). **Same subject. In America.** — In *this country*, the courts hold that where the *mode of enforcement is prescribed by the charter*, that mode must be pursued ;<sup>3</sup> but if the *mode or form of*

<sup>1</sup> Rawlinson on Corp. (5th ed.) 167, note. See *Adley v. Reeves*, 2 Maule & Sel. 61 ; *Bodwic v. Fennell*, 1 Wils. 233. On the other hand, Mr. Grant is of opinion that the remedy prescribed by the act is exclusive, and supersedes the common-law remedy of debt or *assumpsit* for the amount of the fine or penalty. *Grant on Corp.* 364 ; *supra*, secs. 337, 341.

<sup>2</sup> Willc. 164-181 ; 1 Saund. Pl. & Ev. 683 ; 2 Wheat. Selw. 1178 ; 2 Chitty Pl. 401, where form of declaration in debt is given ; *Adley v. Reeves*, 2 M. & S. 60. The law implies a promise on the part of a corporator to pay all penalties incurred for his violation of by-laws ; and if the mode of enforcing such penalties is not pointed out, the corporation may sue therefor in any competent court. *Columbia v. Harrison*, 2 Mill Const. (S. C.)

213, *per Nott, J.* ; *Brookville v. Gagle*, 73 Ind. 117 ; *supra*, secs. 336-346.

<sup>3</sup> *Weeks v. Forman*, 1 Harris. (N. J.) 237 (1837) ; *State v. Zeigler*, 3 Vroom (32 N. J. L.), 262 ; *Ewbanks v. Ashley*, 36 Ill. 177 (1864) ; *Israel v. Jacksonville*, 1 Scam. (2 Ill.) 290 ; *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146, 151 (1843). An action may be brought for the fines and penalties incurred for the violation of ordinances, and it is not necessary that the fine be assessed before the suit is brought. *King v. Jacksonville*, 2 Scam. (3 Ill.) 306. In *Weeks v. Forman*, 1 Harris. (N. J.) 237 (1837), it was held that although certain corporate officers were *ex-officio* justices of the peace within the city, with power to take cognizance of violations of by-laws, they could not entertain or try actions of *debt*, to recover a debt or penalty for a breach of

*action is not prescribed*, then the recovery of the penalty or fine for the violation of a valid municipal ordinance may be as at common law, by an action of debt or assumpsit, or where these forms are abrogated, by a *civil action* in substance the same.<sup>1</sup> And where such an action is brought, the proceeding is civil and not criminal, and the rules of procedure in civil cases, unless otherwise provided, are applicable to it.<sup>2</sup> The penalties to ordinances are often fixed upon a movable scale; and this would appear to be done under the supposition that they will be enforced, not by a common-law action in the common-law courts to recover the amount of the penalty, but by a complaint or proceeding before the proper municipal magistrate, who will, within the prescribed limits, determine the amount of the fine or penalty to be paid, by reference to the circumstances of the particular case.<sup>3</sup>

an ordinance, although it was conceded that they had jurisdiction of the *quasi* criminal proceeding founded upon a complaint or information, resulting in what is technically called a *conviction*; but *quære*. *Supra*, secs. 336-353.

<sup>1</sup> *Ewbanks v. Ashley*, 36 Ill. 178 (1864); *Israel v. Jacksonville*, 1 Scam. (2 Ill.) 290; *Coates v. Mayor*, 7 Cow. (N. Y.) 585, 608 (1827). Unless it is otherwise provided by statute or charter, it is considered that corporations have an inherent power to provide for the recovery of a penalty by an action of debt in their own courts. *Hesketh v. Braddock*, 3 Burr. 1853; *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253. Where a city, by ordinance, requires the taking out of licenses to carry on business, it has no right of action for the amount of such licenses before they are taken out, but is confined to enforcing the penalty for doing business without license. *Santa Cruz v. Santa Cruz R. R. Co.*, 56 Cal. 143; *supra*, sec. 341.

<sup>2</sup> *Id.*; *Municipality v. Cutting*, 4 La. An. 335; *Lewiston v. Proctor*, 27 Ill. 414 (1860); *Quincy v. Ballance*, 30 Ill. 185; *Davenport v. Bird*, 34 Iowa, 524 (1872); *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146, 151 (1843); *Jenkins v. Cheyenne*, 1 Wy. Ter. 287; *St. Louis v. Vert*, 84 Mo. 204; *Miller v. O'Reilly*, 84 Ind. 168; *Brophy v. Perth Amboy*, 44 N. J. L. 217, approving text.

<sup>3</sup> *Ante*, secs. 337, 341. Court held not to be authorized to inquire into the reason-

ableness of an ordinance fixing a fine within the prescribed statutory limit. *Haynes v. Cape May*, 50 N. J. L. 55; s. c. 11 Cent. Rep. 578. If the statute under which the conviction takes place applies the penalty with certainty, it is sufficient for the justice to award the penalty to be paid and applied according to law. *Queen v. Barrett*, 1 Salk. 383; *The King v. Seale*, 8 East, 573; *The King v. Thompson*, 2 T. R. 18; *The King v. Hyde*, 21 L. J. Mag. Cas. 94; *Boothroyd, In re*, 15 M. & W. 1; *The Queen v. Cridland*, 7 E. & B. 853; *The Queen v. Johnson*, 8 Q. B. 102; see also *The King v. Glossop*, 4 B. & Ald. 616; *Brown v. Nicholson*, 5 C. B. n. s. 468; *Seamen's Hospital v. Liverpool*, 4 Ex. 180; *Wray v. Ellis*, 1 E. & E. 276. If there be any material variance between the conviction and the statute as to the appropriation of the penalty, the conviction will be bad. *Griffith v. Harries*, 2 M. & W. 335; *Chaddock v. Wilbraham et al.*, 5 C. B. 645; *Harr. Munic. Man. (Canada)*, 5th ed. 313, 314. A city ordinance prescribing a term of imprisonment which may, but does not necessarily exceed that authorized by the Constitution, may be enforced within the constitutional limit. *Keokuk v. Dressell*, 47 Iowa, 597. Ordinance held void because the fine or penalty was uncertain in amount, the provision being that the offender should be fined not exceeding five dollars, and one dollar for each day's neglect to do a certain act. *State v. Rice (N. C.)*, 2 Southeast. Rep. 180.

§ 411 (344). **Nature of Proceeding, Civil or Criminal.** — Where, instead of a civil action to recover the pecuniary fine or penalty, the proceeding is *in the nature of a complaint for the violation of the ordinance*, this has sometimes been considered to be a criminal or *quasi* criminal, and not a civil, proceeding. The cases on this subject are not harmonious, but the difference in them depends, to a large extent, upon the character of the act or offence charged, the nature of the charter, and of the legislation in the particular State as to the extent of jurisdiction intended to be conferred upon the municipal authorities.<sup>1</sup> The Constitution of Georgia declares that "*trial by jury*, as heretofore used in this State, shall remain inviolate." It was claimed that the legislature could not constitutionally confer on the city council the power to pass an ordinance inflicting a fine for its violation, where the guilt of a party was to be tried by the council, without a jury. The court held that the objection was not sound, observing *that violations of ordinances are not criminal cases* within the meaning of the State Constitution, and "that, inasmuch as the right of trial by jury existed in England, and was secured by *Magna Charta*, and municipal corporations in that country enforced their by-laws by *pecuniary penalties in a summary manner*, and the same right being conferred upon similar corporations in this State anterior to the adoption of the Constitution, and constantly exercised, 'the right of trial by jury, as heretofore used in this State,' was not violated by the city council of Augusta, by the imposition of the penalty for the breach of the *local police regulations* of that city."<sup>2</sup>

<sup>1</sup> Wayne County v. Detroit, 17 Mich. 390; People v. Detroit, 18 Mich. 445; Davenport v. Bird, 34 Iowa, 524 (1872); Charleston v. Oliver, 16 S. C. 47, which was an action for carrying on business without license, in which the municipal court held the defendant liable "for the amount of the license and penalty, and, in default of payment, to an imprisonment of thirty days." The court said that "where, as in this case, no mode of enforcement is prescribed by the charter, we see no reason why the mode pursued in this case is not sufficient," citing the text. See chapter on Municipal Courts, *post*, sec. 427, and note, sec. 432 *et seq.*, and notes; *supra*, secs. 347, 366, 368, and note.

<sup>2</sup> Williams v. Augusta (gunpowder ordinance), 4 Ga. 509 (1848), *per Warner, J.*, approving Low v. Comm'rs of Pilotage,

R. M. Charl't. (Ga.) 316; Flint River Steamboat Co. v. Foster, 5 Ga. 194; Floyd v. Comm'rs, &c., 14 Ga. 354; *ante*, sec. 432 *et seq.*, and notes; Kip v. Paterson, 2 Dutch. (N. J.) 298; Keeler v. Milledge, 4 Zab. (24 N. J. L.) 142; Shafer v. Mumma, 17 Md. 331. "Summary convictions for petty offences against statutes were always sustained, and they were never supposed to be in conflict with the common-law right to a trial by jury." *Per Strong, J.*, Byers v. Commonwealth, 42 Pa. St. 89, 94 (1862). In the case last cited, the extent of the right of jury trial at common law is learnedly examined by Mr. Justice Strong. See, also, Dunmore's Appeal, 52 Pa. St. 374; Rhines v. Clark, 51 Pa. St. 96 (1865). Compare Plimpton v. Somerset, 33 Vt. 283 (1860); see *post*, Municipal Courts, sec. 432 *et seq.* History of Courts of Summary Juris-

§ 412 (345). **Same subject. In Massachusetts.**—On the other hand, in Massachusetts, prosecutions for breaches of by-laws or ordinances made to enforce police regulations are regarded as *substantially public prosecutions*, and in such prosecutions it is competent, though confessed not to be very just, to disallow the defendant costs. Applying this doctrine, it is held that a statute providing that prosecutions for violations of city ordinances in the name of the State or commonwealth is not unconstitutional, notwithstanding the result is that the defendant does not recover costs on acquittal.<sup>1</sup>

diction in England and extent of their powers under the Summary Jurisdiction Act of 1879, see 1 Stephen, *Hist. of Criminal Law*, chap. iv. A statute requiring security for costs, in prosecutions for "penal statutes," does not embrace prosecutions under city ordinances which impose penalties for their violation, such ordinances not being "statutes" within the meaning of the act. *Lewiston v. Proctor*, 27 Ill. 414 (1860); *s. p. Quincy v. Ballance*, 30 Ill. 185. Further, as to the nature of the proceeding and kind of process. *Alton v. Kirsch*, 68 Ill. 261 (1873); and see, also, *Municipality v. Cutting*, 4 La. An. 335; *Ewbanks v. Ashley*, 36 Ill. 177; *Wayne County v. Detroit*, 17 Mich. 390; *People v. Detroit*, 18 Mich. 445, construing the phrase "penal laws," as used in the *Michigan Constitution*. Phrase "municipal fine," in the *Constitution of California*, construed. *People v. Johnson*, 30 Cal. 98 (1866). Violations of ordinances imposing fines and penalties are in the *nature of torts*, and actions for such violations may be prosecuted against one or more of the offending parties; they need not all be joined. *Jacksonville v. Holland*, 19 Ill. 271 (1857). The defendant in such a prosecution cannot raise the question whether the charter of the city is forfeited. *Whalin v. Macomb*, 76 Ill. 49 (1874).

<sup>1</sup> *Godard, In re*, 16 Pick. (Mass.) 504 (1835); *Commonwealth v. Worcester*, 3 Pick. (Mass.) 462. "If," says Chief Justice Shaw, in the case first cited, "the prosecution were to enforce a *private* right by the city, there would be weight in the objection, and it would stand on different grounds." 16 Pick. 508; see *Commonwealth v. Gay*, 5 Pick. (Mass.) 44; *Commonwealth v. Fahey*, 5 Cush. (Mass.) 403.

Similar observations in relation to making sidewalks, by *Ford, J.*, in *Paxson v. Sweet*, 1 J. S. Green (N. J.), 200 (1832). So, in *New Hampshire*, a public prosecution for an offence made penal by a city ordinance because of its supposed evil consequences to society—as, for example, the offence of unlawfully keeping a bowling-alley—is considered to be a criminal, and not a civil, proceeding. *State v. Stearns*, 11 Fost. (31 N. H.) 106 (1855). In *Alabama* such a prosecution is considered *quasi criminal*, and the defendant cannot testify in his own behalf as he may in a civil action. *Mobile v. Jones*, 42 Ala. 630 (1868); *Fink v. Milwaukee*, 17 Wis. 26 (1863), is decided upon the basis that a prosecution of a party for the violation of a city ordinance, where the penalty is a fine, is a criminal prosecution to which the Bill of Rights applies, which declares that "in all criminal prosecutions, the accused shall be entitled to demand the nature and cause of the accusation against him." But a principle so broad, it is believed by the author, can hardly be maintained where the act charged is not a crime at common law or in its essential nature. See chapter on Municipal Courts, *post*. In *Indiana* an action to recover the penalty of a by-law, though a warrant for the arrest of the defendant be issued and served, is considered to be a *civil suit*, and governed by the rules of practice in such suits. *Goshen v. Croxton*, 34 Ind. 239 (1870), and notes.

In *Emporia v. Volmer*, 12 Kan. 622 (1874), it was decided that the provision of the Constitution, that all prosecutions shall be in the name of the State, did not include prosecutions by a municipality in its own courts for a violation of its ordinances, and that such prosecutions might



§ 413 (346). **Mode of pleading Ordinances.** — The courts, unless they are the courts of the municipality, *do not judicially notice the ordinances* of a municipal corporation, unless directed by charter or statute to do so.<sup>1</sup> Therefore, such ordinances, when sought to be enforced by action, or when set up by the defendant as a protection, should be set out or stated in substance in the pleading. It has been sometimes decided that it is not sufficient that they be referred to generally by the title or section. It is, however, believed to be sufficient, in the absence of special legislative provision prescribing the manner of pleading, to set forth the legal substance of that part of the ordinance alleged to have been violated, it being advisable, for purposes of identification, to refer also to the title, date, and section. The liberal rules of pleading and practice which characterize modern judicial proceedings should extend to, and doubtless would be held to embrace, suits and prosecutions to enforce the by-laws or ordinances of municipal corporations.<sup>2</sup>

be in the name of the municipality. But in *Neitzel v. Concordia*, 14 Kan. 446 (1875), it was held, without professing to overrule the previous decision, that a prosecution in a municipal court, under a city ordinance, for a matter made penal by the laws of the State or because of its evil consequences, was a criminal proceeding. Whether the rule would be the same if the prosecution was to enforce a private right of the city, the court left open for further consideration. *Ante*, secs. 366-369; *post*, secs. 429, 432.

<sup>1</sup> See *ante*, sec. 83. *Elizabethtown v. Leffler*, 23 Ill. 90; *Mooney v. Kennett*, 19 Mo. 551 (1854); *New Orleans v. Boudro*, 14 La. An. 303 (1859); *Harker v. Mayor*, 17 Wend. (N. Y.) 199 (1837); *Case v. Mobile*, 30 Ala. 538 (1857); *People v. Mayor, &c. of New York*, 7 How. Pr. R. (N. Y.) 81 (1851); *Cox v. St. Louis*, 11 Mo. 431 (1848); *Garvin v. Wells*, 8 Iowa, 286; *Goodrich v. Brown*, 30 Iowa, 291 (1870); *Austin v. Walton*, 68 Tex. 507; *Wheeling v. Black*, 25 W. Va. 266; *People v. Buchanan*, 1 Idaho, 681. In *England*, when an action on a by-law founded on a custom is brought in a court of the municipality the court will take judicial notice of it, but in an action in the *Superior Courts* the custom and the by-law must be set out, for these courts will not take notice of them. *Wille*, 166, pl. 403; *Ib.* 172, pl. 423; *Ib.* 173, pl. 425; *Brad-*

*nox's Case*, 1 Vent. 196; *Barber Surgeons v. Pelson*, 2 Lev. 252; *Norris v. Staps*, Hob. 211. In *Conboy v. Iowa City*, 2 Iowa, 90, it was held that the mayor, on whom was conferred exclusive jurisdiction of the violation of the ordinances of the city, was authorized to take judicial notice, *ex officio*, of the city ordinances. The provision of a city charter that its published and printed ordinances shall be received in evidence in all courts without proof does not dispense with the necessity of making them part of the record in order to bring them to the knowledge of an appellate court. *Cox v. St. Louis*, 11 Mo. 431 (1848); *New Orleans v. Boudro*, 14 La. An. 303 (1859).

<sup>2</sup> *Harker v. New York*, 17 Wend. (N. Y.) 199 (1837). Text cited, *Emporia v. Volmer*, 12 Kan. 622, 628 (1874). See *Stokes v. Corporation of New York*, 14 Wend. (N. Y.) 87; *Mooney v. Kennett*, 19 Mo. 551 (1854); *Austin v. Walton*, 68 Tex. 507; *ante*, sec. 356, note. In justifying, the defendant must set out in his plea or answer the ordinance, or so much thereof as will show on what the defence rests. *Ib.*; *Keeler v. Milledge*, 4 Zab. (24 N. J. L.) 142 (1857). It is sufficient to set out the substance of that part of the ordinance which has been violated, with a reference to the title, date, and section. *Ib.* *Approved*, *Kip v. Paterson*, 2 Dutch. (N. J.) 298. Regularly, the by-law or its sub-

§ 414 (347). **Requisites of Complaints.** — Under a charter authorizing "complaint" to be made of the violation of ordinances, but not prescribing the mode or requisites, a complaint is not in the nature of an information by a common informer, and the same strictness is not required as in an information or indictment. "It is sufficient if it sets out with clearness the offence charged, and the substance of that part of the ordinance which has been violated, with a reference to the title, date, or section."<sup>1</sup>

stance should be set forth. *Case v. Mobile*, 30 Ala. 538 (1857); *Charleston v. Chur*, 2 Bailey (S. C.), 164. By-law need not be pleaded in full; complaint is sufficient if it refers to the ordinance and alleges facts showing a violation thereof. *Lane, Ex parte*, 76 Cal. 587; s. c. 18 Pac. Rep. 677; *infra*, sec. 414, note. Defective pleading of an ordinance held to be waived by a plea of not guilty and going to trial on the merits. *State v. Welch*, 21 Minn. 22. In *England*, the by-law itself must be fully set out in an action of *debt* upon it, and not by way of recital; but in *assumpsit* upon the same by-law, latitude is allowed. *Willcock*, 173, pl. 425. But in this country it is said that "it is not necessary to hold to the strictness anciently required." *Keeler v. Milledge*, 4 Zab. (24 N. J. L.) 142. In *Missouri* by statute, fines and penalties accruing to any town may be recovered by *civil* action; but the complaint, while it need not contain all the requisites of an indictment, must specify the offence with reasonable certainty. *St. Louis v. Smith*, 10 Mo. 438. This is the true rule. Hence a complaint charging only that "the defendant committed an offence [naming it] contrary to an ordinance of the town" is insufficient. *Memphis v. O'Connor*, 53 Mo. 468 (1873). So a charge that "the defendant knowingly associated with thieves previous to August 21, 1871," is too vague, no place being named and the names of the thieves not being given. *St. Louis v. Fitz*, 53 Mo. 582 (1873). In *Indiana*, before the act of 1867, it was necessary to file with the complaint a copy of the ordinance or section thereof alleged to have been violated. *Green v. Indianapolis*, 25 Ind. 490; *Whitson v. Franklin*, 34 Ind. 392 (1870). On demurrer to a complaint which does not set out the ordinance

alleged to be violated, but refers only to the number of the section, the validity of the ordinance was presumed. *Frankfort v. Aughe* (Ind.), 15 N. E. Rep. 802. In *North Carolina*, it is held not to be necessary to set forth an ordinance alleged to have been violated; it is sufficient to refer to it by *indicia*, pointing it out with reasonable certainty. *State v. Cainan*, 94 N. C. 880. Unless required by law or ordinance a complaint, *not under oath*, will not necessarily vitiate the proceedings if the magistrate has jurisdiction of the subject. *Alton v. Kirsch*, 68 Ill. 261 (1873). Several breaches of an ordinance may be sued for in one suit, if the judgment does not exceed the amount of the magistrate's jurisdiction. *Hensoldt v. Petersburg*, 63 Ill. 111 (1872). Where a charter provides that "a warrant shall issue in favor of a city . . . for a violation of any ordinance when, &c., or upon affirmation by the city attorney, there is no authority for a deputy city attorney to swear to a complaint; power thus provided must be exercised by the city attorney in person." *Kansas City v. Flanagan*, 69 Mo. 22.

<sup>1</sup> *Keeler v. Milledge*, 4 Zab. (24 N. J. L.) 142 (1857). Approved, *Kip v. Paterson*, 2 Dutch. (N. J.) 298; *City Council v. Seeba*, 4 Strob. (S. C.) Law, 319; *Commonwealth v. Bean*, Thach. (Mass. Crim. Cas.) 85. Compare *Fink v. Milwaukee*, 17 Wis. 26 (1863); see, also, *Commonwealth v. Bean*, 14 Gray (Mass.), 52; *Deitz v. City*, 1 Col. 323; *Napman v. People*, 19 Mich. 352 (1869); *Goshen v. Croxton*, 34 Ind. 239 (1870); *Frankfort v. Aughe* (Ind.), 15 N. E. Rep. 802; *Whitson v. Franklin*, 34 Ind. 392 (1870); *State v. Cainan*, 94 N. C. 880; *Nodine v. Union*, 13 Oreg. 587. Where the process did not state what ordinance had been violated,

§ 415 (348). **Same subject.** — In an action or proceeding to recover a penalty for the violation of a by-law or ordinance of a corporation, *the declaration or complaint should state facts which make the liability of the defendant distinctly to appear.*<sup>1</sup> And regularly,

nor the time or manner, the proceedings were held defective. *State v. Trenton*, 7 Vroom (36 N. J. L.), 283; *Hendersonville v. McMinn*, 82 N. C. 532. The complaint need not state the number of the section violated. *Meyer v. Bridgeton*, 8 Vroom (37 N. J. L.) 160. The ordinance need not be recited in full. *Emporia v. Volmer*, 12 Kan. 622 (1874); *Goldthwaite v. Montgomery*, 50 Ala. 486 (1874); *St. Louis v. Smith*, 10 Mo. 438. *Supra*, sec. 413, and note. An allegation in a pleading that an ordinance was duly passed held to imply, by necessity, that all essential antecedents for its legal enactment had been observed. *Becker v. Washington*, 94 Mo. 375 (1888). By statute, prosecutions for the violations of the ordinances of Boston may be prosecuted in the name of the commonwealth; and it is decided that in a complaint for such a violation it is not sufficient that it concludes "against the form of the by-laws of the said city," but it must conclude also against the form of the statute. *Commonwealth v. Gay*, 5 Pick. (Mass.) 44 (1827); *Commonwealth v. Worcester*, 3 Pick. (Mass.) 462 (1826). Complaint must be in the name of the treasurer of the city or town, and not in that of the commonwealth, for violation of health ordinances, since the statute of 1849. Ch. cxi. sec. 7; *Commonwealth v. Fahey*, 5 Cush. (Mass.) 408 (1850). Policemen, marshals, and other officers of a municipal corporation, where such a course is not repugnant to the Constitution or general law of the State, may be empowered by an ordinance to *arrest offenders without warrant*, for breaches of ordinances committed in their presence. *Bryan v. Bates*, 15 Ill. 87; *Main v. McCarty*, 15 Ill. 442; *State v. Lafferty*, 5 Harring. (Del.) 491. *Ante*, secs. 210, 211. "A city ordinance providing that any person who shall refuse to obey an order at a fire given by any officer duly authorized, 'may be arrested and detained in custody until the fire is extinguished,' is unconstitutional, because the

person is deprived of his liberty without due process of law, and because his right to trial by jury is invaded. The court distinguish between an arrest of this kind and where the purpose of the arrest is preliminary to and contemplates a judicial examination. *Judson v. Reardon*, 16 Minn. 431 (1871). Under the charter of Newark a violator of an ordinance of that city cannot, without his consent, be brought into court for trial, unless by a warrant or summons. *Newark v. Murphy*, 40 N. J. L. 145; *ante*, secs. 210, 211; *Mitchell v. Lemon*, 34 Md. 176 (1870); *Butolph v. Blust*, 5 Lansing (N. Y.), 84 (1871). Requisites of *warrants* for the violation of municipal ordinances. *White v. Washington*, 2 Cranch Cir. C. 337. Other cases: *Id.* 356; *Id.* 459; 4 Cranch Cir. C. 103; *Id.* 582; *Prells v. McDonald*, 7 Kan. 426 (1871). A penalty cannot be imposed without notice. *Alexandria v. Bethlehem*, 5 Dutch. (N. J.) 375, 377. Sufficiency of *notice* to the accused under special charter provisions, *Keeler v. Milledge*, 4 Zab. (24 N. J. L.) 142. *Essentials of summary convictions.* *Commonwealth v. Borden*, 61 Pa. St. 272.

<sup>1</sup> *Saund. Pl. & Ev.* 324; *Comyns Dig. tit. Pleader* (2 W. 11); *Feltmakers v. Davis*, 1 Bos. & Pul. 98; *Piper v. Chappell*, 14 M. & W. 623; *Case v. Mobile*, 30 Ala. 538 (1857); *Coates v. Mayor*, 7 Cow. (N. Y.) 585, 608 (1827), where the substance of a declaration in debt is given; *Charleston v. Chur*, 2 Bailey (S. C.), 164; *Krickle v. Commonwealth*, 1 B. Mon. (Ky.) 361 (1841). *Pleader* need not negative exception in a proviso to the enacting clause of an ordinance or in a subsequent section, this being a matter of defence. *Lynch v. People*, 16 Mich. 472 (1868). See *Roberson v. Lambertville*, 9 Vroom (38 N. J. L.), 69; *McGear v. Bridgeton*, 4 Vroom (33 N. J. L.), 213; *Farwell v. Smith*, 1 Harr. (N. J.) 133. The conviction must be for the same offence for which the defendant is prosecuted. *Columbus v. Arnold*, 30 Ga. 517.

as before stated, the by-law should be set forth or its substance stated, as well as the breach and the plaintiff's right to sue for the penalty. But where the charter or organic act of the corporation will be judicially noticed, it cannot be necessary to set out, as it has been held to be in England, the authority of the corporation to make the by-law.<sup>1</sup>

§ 416 (349). **Action in Corporate Name; Prescribed Method to be strictly followed; Demand; Notice.** — Where the penalty is given in general terms, it is understood to be to the use of the corporation, and the action or prosecution must be by and in the name of the corporation.<sup>2</sup> In England, it was the practice, in many cases, to appoint in the by-law the penalty to be sued for in the name of the chamberlain, treasurer, or some other officer of the corporation; and though the power of thus suing for the penalty could not be given to a mere stranger, yet it was not absolutely necessary that the penalty should be given to the corporation, but it might be given to the informer.<sup>3</sup> Whenever the mode of enforcing obedience to a by-law is prescribed by such by-law, that mode must be strictly pursued, and the plaintiff (where the rules of common-law pleading prevail) must be the party to whom the penalty is given. Where it is given to the chamberlain for the use of the corporation, the action must be in the name of the chamberlain, and not in that of the corporation. And when the chamberlain may sue, he need not set out his election or appointment, but may aver generally that he is chamberlain, and set forth his right to sue and to recover.<sup>4</sup> Unless the ordinance show that it was intended that no action for a penalty should lie without a previous demand, it is not necessary to aver one.<sup>5</sup> Nor is it necessary to aver that the defendant had notice of the ordinance, for this is conclusively presumed with respect to all on whom it is binding.<sup>6</sup>

<sup>1</sup> *Norris v. Staps*, Hob. 211.

<sup>2</sup> *Bodwic v. Fennell*, 1 Wils. 233; *Vintners' Co. v. Passey*, 1 Burr. 235; *Glover*, 313; 2 Kyd, 157; *Graves v. Colby*, 9 Ad. & El. 356; *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146, 151 (1843); *ante*, chap. viii.

<sup>3</sup> *Glover*, 313, 314, 315; *Feltmakers' Co. v. Davis*, 1 B. & P. 101; *Bodwic v. Fennell*, 1 Wils. 233; *Totterdell v. Glazby*, 2 Wils. 266; *Hesketh v. Braddock*, 3 Burr. 1848; *Wood v. Searl*, Bridg. 141; *Graves v. Colby*, 9 Ad. & El. 356.

<sup>4</sup> *Harris v. Wakeman*, Say. 254; *Exeter v. Starre*, 2 Show. 159. Under constituent act, town treasurer held entitled to sue in his own name for penalties. *Watts v. Scott*, 1 Dev. (N. C.) 291; *Commonwealth v. Fahey*, 5 Cush. (Mass.) 408 (1850).

<sup>5</sup> *Butchers' Co. v. Bullock*, 3 Bos. & P. 434, 437.

<sup>6</sup> *London v. Bernardiston*, 1 Lev. 16; *James v. Putney*, Cro. Car. 498.

§ 417 (350). **Mode of Procedure, Defences, Evidence, &c.** — In prosecutions to enforce ordinances, the *ordinary rules of evidence* apply, except so far as specially modified by statute; and it is not competent for a municipal corporation, without express authority, to make or alter the rules of evidence or of law.<sup>1</sup> It is, however, competent for a city to provide by general ordinance, after suit commenced to recover a penalty for acting without a license, that the granting of a license, though by its terms it takes effect from a day previous to the commission of the offence, shall not (as might otherwise be the case) *release or waive the penalty*.<sup>2</sup>

§ 418 (351). **Corporate Existence not to be questioned in such actions.** — In proceedings to enforce ordinances, the *illegality* of the *corporate organization* cannot be shown to defeat a recovery; in such a collateral proceeding, evidence that the corporation is acting as such is all that is required.<sup>3</sup>

§ 419 (352). **Ratification of Illegal Ordinances by Legislature.** — The legislature may ratify ordinances not otherwise binding; and offenders should thereafter be prosecuted under the *ordinances*, and not under the validating act.<sup>4</sup>

<sup>1</sup> *City Council v. Dunn*, 1 McCord (S. C.), 333; *Fitch v. Pinckard*, 4 Scam. (5 Ill.) 78. The defendant's admission of a violation of an ordinance is competent evidence. *Columbia v. Harrison*, 2 Const R. (S. C.) 213 (1818).

<sup>2</sup> *City Council v. Schnidt*, 11 Rich. (S. C.) Law, 343; *City Council v. Corleis*, 2 Bailey (S. C.), 189. Commented on by O'Neill, J., in *City Council v. Feckman*, 3 Rich. (S. C.) Law, 385. And see case last cited as to other circumstances, in which it was held that a prior penalty was not waived by a subsequent acceptance of the amount of a license for a year.

A license granted by a *de facto* officer of a municipal corporation is valid; if the city receives and retains the money, it is estopped from maintaining an action for selling liquor without license. *Martel v. East St. Louis*, 94 Ill. 67 (1880); s. c. 21 Alb. L. J. 195.

Any positive acts (*infra vires*) by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself, by retracting

what its officers had done, will work an estoppel. *Martel v. East St. Louis*, 94 Ill. 67; *Roby v. Chicago*, 64 Ill. 447; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 39; *Logan County v. Lincoln*, 81 Ill. 156.

<sup>3</sup> *Hamilton v. Carthage*, 24 Ill. 22; *Mendota v. Thompson*, 20 Ill. 197; *Coles County v. Allison*, 23 Ill. 437; *Decorah v. Gillis*, 10 Iowa, 234; *Kettering v. Jacksonville*, 50 Ill. 39; *Tisdale v. Minonk*, 46 Ill. 9 (1867); *Hardenbrook v. Ligonier*, 95 Ind. 70.

<sup>4</sup> *Truchelut v. City Council*, 1 Nott & McC. (S. C.) 227 (1818); *Lennon v. New York*, 55 N. Y. 361 (1874); *ante*, chap. iv. sec. 79, and note. *Post*, sec. 544; *Logansport v. Crockett*, 64 Ind. 319, approving text. In *State v. Plainfield*, 9 Vroom (38 N. J. L.), 95, where an ordinance was void for want of proper notice to the persons interested, it was held that the error could not be remedied by subsequent legislation. But see cases cited *post*, sec. 814, note. And in *New Jersey* also it has been frequently held that the legislature may validate informal or irregular

§ 420 (353). **Ordinances to be construed reasonably.**—In prosecutions or actions to enforce ordinances, or in considering the question of their validity, *courts will give them a reasonable construction*, and will incline to sustain rather than to overthrow them; and especially is this so where the question depends upon their being reasonable or otherwise. Thus, if by one construction an ordinance will be valid, and by another void, the courts will, if possible, adopt the former. But an ordinance which transcends the power vested in the body which passed it is void, and may be taken advantage of by plea or answer to an action to recover the penalty, or other proceedings to enforce it.<sup>1</sup> Its validity may also be tested in proper cases by suits against the corporation or its officers for acts done under it,<sup>2</sup> or by a return to a *mandamus* where the party justifies his

municipal action, when the matters dispensed with or cured did not relate to the jurisdiction of the courts. *Bergen v. State*, 3 Vroom (32 N. J. L.), 490; *State v. Union*, 4 Vroom (33 N. J. L.), 350; *State v. Newark*, 5 Vroom (34 N. J. L.), 236.

<sup>1</sup> *Commonwealth v. Robertson*, 5 Cush. (Mass.) 438, 442; *Vintners' Co. v. Passey*, 1 Burr. 239; *Poulter's Co. v. Phillips*, 6 Bing. N. C. 314, 323; *Taylor's of Ipswich*, 11 Rep. 54 a; *Norris v. Staps*, Hob. 211; *Tobacco, &c. Co. v. Woodroffe*, 7 B. & C. 838; *Moir v. Munday*, Sayer, 181, 185; *Rounds v. Mumford*, 2 R. I. 154 (1852). The rules for the construction of ordinances are the same as for statutes. *Matter of Yick Wo*, 68 Cal. 294. Where the legislature has conferred full and exclusive jurisdiction on a municipal corporation over a certain subject, the acts of the corporation will be supported by every fair intendment and presumption. *Baltimore v. Clunet*, 23 Md. 449 (1865). The title and the body of the ordinance may be taken together to give it the necessary certainty to sustain it. *Martindale v. Palmer*, 52 Ind. 411 (1876). In view of the inartificial character of town by-laws, they are especially entitled to a reasonable construction. *Whitlock v. West*, 26 Conn. 406; *Wille. Mun. Corp.* 159, pl. 382. By-laws with penalties are not properly penal statutes. The penalty is in the nature of liquidated damages, established as such in lieu of damages which a court would be authorized to assess. Therefore the strict rules by which the validity of penal statutes are to be tested are not to

be applied to the by-laws or ordinances of municipal corporations. It is well remarked that "the by-laws of very few of these corporations could stand such a test. They should receive a reasonable construction, and their terms must not be strictly scrutinized for the purpose of making them void." *Per Eustis, C. J., Municipality v. Cutting*, 4 La. An. 335; *Merriam v. New Orleans*, 14 La. An. 318; *s. p. Loze v. Mayor, &c.*, 2 La. 427. If, however, the ordinance is, in its nature, highly penal, it will and ought to be construed strictly, and it must clearly embrace the offence charged. *Krickle v. Commonwealth*, 1 B. Mon. (Ky.) 261 (1841). See also *Pacific v. Seifert*, 79 Mo. 210, stating the rule in *Missouri* to be that an ordinance "*in its nature penal must be strictly construed*, and its provisions cannot be carried beyond its express terms." In *State v. Paris Ry. Co.*, 55 Tex. 76, the court, referring to an ordinance authorizing a railroad company to extend its track to a certain point, said,—"There is no ambiguity in the ordinance authorizing its explanation by parol evidence of representations made prior to its passage, or of the actual intention or understanding of those by whom it was passed, as to the precise point at which the road was to be constructed." Contemporaneous construction often of great weight in interpreting doubtful provisions. *State v. Severance*, 49 Mo. 401 (1872); *ante*, sec. 93, note; sec. 184, note.

<sup>2</sup> *Moir v. Munday*, Sayer, 181, 185. *St. Charles v. Meyer*, 58 Mo. 86 (1874).

refusal to comply with the writ on the ground that the ordinance is invalid,<sup>1</sup> or, as elsewhere shown, in cases of equitable cognizance, by bill in chancery to enjoin proceedings thereunder.

§ 421 (354). *Ordinances void in part.*—If *part of a by-law be void*, another essential and connected part of the same by-law is also void.<sup>2</sup> But it must be essential and connected to have this effect.<sup>3</sup> Thus, if an ordinance, or even the same section of an ordinance, contains two separate prohibitions relating to different acts, with distinct penalties for each, one of which is valid and the other void, the ordinance may be enforced as to that portion of it which is valid.<sup>4</sup>

See protective provisions to corporate officers and agents in Municipal Corporations, Act 5 and 6 Wm. IV. chap. lxxvi. secs. 132, 133. In the *Canadian Municipal Act*, sec. 332 (Harrison's *Munic. Man.* 5th ed. p. 238), there is what the author would suppose to be a very useful provision to test summarily the validity of by-laws, to the effect that a resident of a municipality or any other person interested in a by-law, order, or resolution may, within one year, apply to either of the superior courts of common law to have it quashed, and the court, after notice to the corporation, may quash the by-law, order, or resolution, in whole or in part, for illegality; and it is further provided (sec. 338), that in case anything has been done under such illegal by-law, order, or resolution, which gives any person a right of action, no action shall be brought until one month's notice thereof be given to the corporation, and such action must be brought against the corporation and not against any person acting under the by-law, order, or resolution. Construction of provision, see Harrison's *Munic. Man.* (5th ed.) pp. 239, 245.

<sup>1</sup> *Rex v. Harrison*, 3 Burr. 1322; *Grant on Corp.* 89. An ordinance may be void for uncertainty in its provisions, as, for example, one which alters street grades, without referring to any plan or establishing new grades. *Kearney v. Andrews*, 2 Stock. (N. J.) 70.

<sup>2</sup> *Austin v. Murray*, 16 Pick. (Mass.) 121, 126 (1834), *Com. Dig.* By-law, chap. vii.; *Rex v. Faversham Fishermen's Co.*, 8 Durnford & East Term Rep. 356. See *Commonwealth v. Stodder*, 2 Cush.

(Mass.) 562 (1848); *Fisher v. McGirr*, 1 Gray (Mass.), 1; *Warren v. Mayor, &c.*, 2 Gray (Mass.), 84; *Commonwealth v. Hitchings*, 5 Gray (Mass.), 482; *Hershoff v. Beverly*, 45 N. J. L. (16 Vroom) 288.

<sup>3</sup> *Villavaso v. Barthet*, 39 La. An. 247.

<sup>4</sup> *Commonwealth v. Dow*, 10 Met. (Mass.) 382 (1845); *Amesbury v. Bowditch M. F. Insurance Co.*, 6 Gray, 596; *Warren v. Charlestown*, 2 Gray, 84; *Shelton v. Mobile* (market ordinance), 30 Ala. 540 (1857); *Rogers v. Jones*, 1 Wend. (N. Y.) 237; *Thomas v. Mount Vernon*, 9 Ohio, 290; 1 Stra. 469; *Sir T. Raym.* 238, 294; *Sayer*, 256; 1 B. & Ad. 95; 7 Term R. 549; *Staats v. Washington*, 45 N. J. L. (16 Vroom) 318; *Piqua v. Zimmerlin*, 35 Ohio St. 507; *State v. Kantler*, 33 Minn. 69. Where a charter authorized the penalty of fine and imprisonment, an ordinance imposing in addition thereto "costs of prosecution" was declared void as to such addition, but valid as to the remainder. *State v. Cantieny*, 34 Minn. 1. "If a by-law be entire, each part having a general influence over the rest, and one part of it be void, the entire by-law is void." *Willcock on Corp.* 160, pl. 384; approved, *Municipality v. Morgan*, 1 La. An. 111, 116 (1846); *Ex parte Mayor, &c. of Florence*, 78 Ala. 419; *Rau v. Little Rock*, 34 Ark. 303. "But if a by-law consist of several distinct and independent parts, although one or more of them may be void, the rest are equally valid as though the void clauses had been omitted." *Willcock*, 161, pl. 389; *Fitzacherly v. Wiltshire*, 11 Mod. 353; *Lee v. Walis*, 1 Kenyon, 295. In a leading case, *Rex v. Faversham Fishermen's Co.*, 8 D. &

§ 422 (355). **Proof of Ordinances.**—When not specially regulated by charter or statute, the *proof of ordinances* must be by the production of the originals or the books in which they are registered, as these are the primary evidence.<sup>1</sup> Printed copies, or authenticated copies, are often made competent evidence by the legislature.

§ 423. **Presumption of Validity.**—Where authority to pass an ordinance on a given subject was conditioned that it should be first

E. T. R. 356, Lord *Kenyon* said: "With regard to the form of the by-law indeed, though a by-law may be good in part and bad in part, yet it can be so only when the two parts are entire and distinct from each other." Approved, *Municipality v. Morgan*, 1 La. An. 111, 116 (1846). The fact that certain provisions of an ordinance are void does not authorize the court to declare void those provisions which relate to the subject-matter of the ordinance, when they are distinct and separate from those which are void and useless. *State v. Hardy*, 7 Neb. 377. It is stated in *Grant on Corporations*, 88, that it is "now fully settled that a by-law that is void in part is void wholly; *e. g.* if the penalty be unreasonable the rest of the by-law is vitiated thereby, and becomes wholly inoperative and null." Citing *Com. Dig. By-Law*, chap. vii.; *Colchester v. Godwin*, Carter, 121; *Elwood v. Bullock*, 6 Q. B. 383; *Clarke v. Tucket*, 2 Vent. 182; *Rex v. Atwood*, 4 B. & Ad. 481. But the rule in the text is well sustained, and is reasonable; and it is not true that the void part of a by-law will make null complete and independent parts of the same by-law which would otherwise be good. *State v. Clarke*, 54 Mo. 17, 36 (1873). The act authorizing a sewerage system being unconstitutional in part, so that the scheme adopted could not be made available, the undertaking was arrested. *State v. Chamberlin*, 8 Vroom (37 N. J. L.), 388.

<sup>1</sup> *Lumbard v. Aldrich*, 8 N. H. 31; *Stevens v. Chicago*, 48 Ill. 498; *Moor v. Newfield*, 4 Greenl. (Me.) 44; *Hallowell Bank v. Hamlin*, 14 Mass. 178; *Case of Thetford*, 12 Vin. Abr. 90; *ante*, sec. 300, note; *infra*, sec. 423. *Stewart v. Clinton*, 79 Mo. 603; *Tipton v. Norman*, 72 Mo. 380. In *Information against Oliver*, 21

S. C. 319, *McGowan, J.*, said, that in a municipal court, "it was no more necessary to offer proof of a public ordinance, under the seal of the city council, than in the courts of the State to prove a public act of the legislature. Municipal ordinances are private laws when brought before the superior judiciary of a State, but not when brought before a city court." See chapter on Corporate Records and Documents, *ante*, sec. 293 *et seq.* Proof may be made by the clerk that he posted up copies of an ordinance appearing on the records, without producing such copies or accounting for their absence. *Teft v. Size*, 5 Gilm. (10 Ill.) 432. As to promulgation and publication of ordinance. *Charleston v. Chur*, 2 Bailey (S. C.), 164; *Kittering v. Jacksonville*, 50 Ill. 39; *Napa v. Easterby* (Cal.), 18 Pac. Rep. 253; *Nevin v. Roach* (Ky.), 5 Southwest. Rep. 546; *Downing v. Miltonvale* (record of ayes and nays) (Kan.), 14 Pac. Rep. 281; *Brophy v. Hyatt* (Col.) (record of ayes and nays), 15 Pac. Rep. 399; *Sullivan v. Leadville*, 11 Col. 483; *s. c.* 18 Pac. Rep. 736; *State v. Irvington* (what is sufficient publication), 50 N. J. L. 361; *supra*, secs. 331-335; *infra*, sec. 423; *Chicago & A. R. Co. v. Engle*, 76 Ill. 317 (1875).

Where the charter provides that the printed volume of City Ordinances shall be evidence in all courts, the ordinances printed therein will be judicially noticed the same as public statutes. *Napman v. People*, 19 Mich. 352 (1869); *St. Louis v. St. Louis Railroad Co.*, 89 Mo. 44. In *Kansas* the appellate court, upon the trial of an appeal from a conviction under an ordinance, will take *judicial notice* of the existence and substance of the ordinance. *Downing v. Miltonvale*, 36 Kan. 740; *ante*, sec. 83.



submitted to the voters of the municipality and adopted by a majority vote, in a prosecution for a breach thereof it was held that the further provision of the charter, that an ordinance might be proved by a copy thereof duly certified, &c., did not dispense with the necessity of proving that the ordinance was submitted to the voters and adopted, and that it had been published as required by law, the only effect of the charter provision being to dispense with the production of the original ordinance by making the certified copy evidence.<sup>1</sup>

<sup>1</sup> *Schott v. The People*, 89 Ill. 195 (1878). *Scholfield, J.*, adds: "Municipal corporations exercise only delegated and limited powers, and, in the absence of express statutory provisions to that effect, courts are authorized to indulge in no presumptions in favor of the validity of their ordinances. If in conformity with the express or necessarily implied grant of the charter, they are valid; otherwise not."

## CHAPTER XIII.

## MUNICIPAL COURTS.

*Municipal Courts in England and at Common Law.*

§ 424 (356). **At Common Law.**—A municipal corporation *may, at common law, enjoy the franchise of holding a court*; and corporation or municipal courts, which were local or inferior tribunals, were not uncommon.<sup>1</sup> They were treated as the tribunals of the corporation; but since courts of justice are for the public benefit, words in a charter permitting the corporation to hold a court are imperative.<sup>2</sup> Such public right cannot be lost by a non-user; and therefore the mere disuse, for two hundred years, of a court granted to a corporation by charter is no answer to a rule for a *mandamus* commanding them to hold it, though it was alleged that there were no sufficient funds for the purpose.<sup>3</sup>

§ 425. **Jurisdiction; Parties; Jurors.**—The *common-law doctrine respecting municipal courts* was settled to be that the municipal corporation could bring no action therein against a stranger where the effect would be to benefit the corporation or increase its funds, for that would be to make the corporation itself both judge and party, which an inflexible and fundamental maxim of the common law prohibited; and the same principle was considered to operate to disqualify corporators to sit as jurors in such cases; but this objection did not apply when both parties were corporators.<sup>4</sup>

§ 426. **Existing Borough Courts.**—The English Municipal Corporation Act of 1835 provides *for the establishment of borough courts,*

<sup>1</sup> Inst. 114; 4 Inst. 78, 224; Cro. Jac. 313; Haddock's Case, Sir Thomas Raymond, 435.

<sup>2</sup> Rex v. Mayor, &c. of Hastings, 5 B. & Ald. 692, n. The language of the charter was "that the mayor *may* for the purpose hereafter have and hold and have power to hold a court of record," and it was held that these words, though permissive in form, were imperative, and that the corporation was bound to hold

the court for the benefit of the inhabitants. *Ib.*; Grant on Corp. 34.

<sup>3</sup> Rex v. Mayor, &c. of Wells, 4 Dowl. P. C. 562.

<sup>4</sup> Hesketh v. Braddock, 3 Burr. 1856-1868; cited *infra*, sec. 431, note; Grant on Corp. 194; London v. Wood, 12 Mod. 674; 1 Salk. 398; Bosworth v. Budgen, 7 Mod. 461; Reg. v. Rogers, 2 Ld. Raym. 778; Willc. on Corp. 157, 165. See *infra*, sec. 431.

defines their jurisdiction and powers, makes burgesses or citizens competent jurors, contains an express provision that no witness or magistrate shall be incompetent or disqualified by reason of his being liable to contribute to the fund of the corporation, and regulates in general the proceedings therein for violation of by-laws or ordinances, and the collection and enforcement of penalties.<sup>1</sup>

It may, however, be observed that under the act the power to make by-laws is limited, and does not extend to acts criminal in their nature, and which are punishable by criminal statutes in force throughout the realm.

*American Corporation Courts; Constitutional Provisions.*

§ 426 a. **Introductory Observations.** — Here, as elsewhere, *the composite type of the usual American municipality* in its local and private, as well as its general and public character, distinctly reveals itself. Although often material it is not always easy to trace the line of demarcation. To ascertain and define it as applicable to this chapter we have to resort to the construction which well-known provisions of *Magna Charta* relating to personal rights and liberty have received in Great Britain and here, and to the legislative enactments and polity in both countries, and in this country to special constitutional provisions relating thereto, and to the powers and jurisdiction of the judicial tribunals. The subject is obviously important. Statutory provisions concerning the constitution and powers of the municipal government and those of the local tribunals, especially provisions authorizing summary proceedings in municipal courts without trial by jury and without the usual formulæ of an adversary proceeding in the superior judicial tribunals, have frequently been found to be in conflict with organic provisions to secure fundamental rights of property and the liberty of the citizen. Summary powers, properly defined and limited, are essential to the well-being of local communities, and when thus limited and defined are perfectly consistent with the liberty of the citizen, that is, liberty regulated by law, which is the only true liberty. These limits must be sought largely in the polity, practice and traditions, and in the judicial judgments in England and in this country relating thereto, in

<sup>1</sup> 5 and 6 Wm. IV. chap. lxxxvi, secs. 90, 91, 118-134, 270-341 (1835). Mr. Justice *Stephen* traces the history of Borough Courts prior to the act of 1835, and states the changes made by that act. *Hist. Criminal Law*, vol. i. chap. iv. p. 116 *et seq.* He also summarizes the legis-

lation authorizing the infliction of summary penalties of different kinds upon a great variety of offenders, ending in the Summary Jurisdiction Act of 1879 (42 & 43 Vict. chap. 49). *Ib.*, chap. iv. p. 122. *Post*, sec. 337 *et seq.*

the light of which constitutional provisions must be construed. Some pains have therefore been taken to exhibit in the text the material doctrines of our jurisprudence on these subjects, and in the notes to furnish the reader with the data for full research, critical consideration, and the formation of his own conclusions.

§ 427 (357). **Creation, Jurisdiction, and Powers.**—In this country it is usual to provide in the charter or organic act of a municipal corporation *for a local or special tribunal*, called by different names, such as the mayor's court, recorder's court, city court, and the like; and which is invested with jurisdiction over complaints and prosecutions for the violation of the ordinances of the corporation, and often, for public convenience, with special civil and limited criminal jurisdiction under the laws of the State. It is competent for the legislature to provide for the establishment of these inferior courts, and to invest them with such measure of power and jurisdiction as may be deemed expedient, if no provision of the Constitution of the particular State be infringed.<sup>1</sup> It may also abolish them.<sup>2</sup>

<sup>1</sup> *State v. Mayor of Charleston*, 12 Rich. (S. C.) Law, 480; *State v. Helfrid*, 2 Nott & McCord (S. C.), 233 (1820); *infra*, sec. 432, note; *Callahan v. New York*, 66 N. Y. 656; *People v. Curley*, 5 Col. 412.

*Constitutional provisions concerning the establishment and powers, local, civil, and criminal, of Inferior Courts:* The power conferred on police magistrate to issue process against the body of an offender is constitutional. *Brown v. Jerome*, 102 Ill. 371. The legislature has no power to confer upon local municipal courts a jurisdiction which is exclusive of that which, by the Constitution, is given to another court. *Montross v. State*, 61 Miss. 429. Full discussion of *legislative power to create inferior courts*, and define jurisdiction. *Callahan v. New York*, 66 N. Y. 656; *Gray v. State*, 2 Harring. (Del.) 76 (1835). Mayor's court an *inferior* court within meaning of State Constitution. *Ib.*; *Egleston v. City Council*, 1 Mill Const. (S. C.) 45. As to official character of city recorder. *Ib.*; *Schroder v. City Council*, 2 Const. R. 726; s. c. 3 Brev. 533; *post*, sec. 430; *Tesh v. Commonwealth*, 4 Dana (Ky.), 522; *Nugent*

*v. State*, 18 Ala. 521 (1821); holding the city court of Mobile, which is invested with criminal jurisdiction, and from whose judgment an appeal lies, to be constitutional, and defining meaning of *inferior court*. *Perkins v. Corbin*, 45 Ala. 103 (1871), holding that a city court is an inferior court within the meaning of the Constitution, which may be created and abolished at the pleasure of the legislature, and that the abolition of the court carries with it the office of the Judge. *New Orleans v. Costello*, 14 La. An. 37; *Myers v. People*, 26 Ill. 173; *Davis v. Woolnough*, 9 Iowa, 104; *People v. Wilson*, 15 Ill. 389; *State v. Maynard*, 14 Ill. 419; *Beesman v. Peoria*, 16 Ill. 484; *Holmes v. Fihlenburg*, 54 Ill. 203 (1870); *Van Swartow v. Commonwealth*, 24 Pa. St. 131 (1854); *Tierney v. Dodge*, 9 Minn. 166; *St. Peter v. Bauer*, 19 Minn. 327 (1872); *infra*, sec. 432, note; *Burns v. La Grange*, 17 Texas, 415 (1856); *Slattery, In re*, 3 Ark. 484; *Ib.* 561; *Graham v. State*, 1 Pike (1 Ark.), 171; *Floyd v. Eatonton Comm'rs*, 14 Ga. 354 (1853); *Hill v. Dalton*, 72 Ga. 314; *State v. Gutierrez*, 15 La. An. 190; *Muscatine v. Steck*, 7 Iowa, 505; *Richmond Mayoralty*

<sup>2</sup> *Boyd v. Chambers*, 78 Ky. 140; *State v. Henshaw*, 76 Cal. 436 (1888).

§ 428 (358). **Summary trials for Violations of Ordinances.** — We have elsewhere shown that the courts have uniformly held that it

Case, 19 Gratt. (Va.) 673 (1870). The superior court of the city of San Francisco is constitutional. *Seale v. Mitchell*, 5 Cal. 403; *Vassault v. Austin*, 36 Cal. 691; *Hickman v. O'Neal*, 10 Cal. 294. The Constitution of *California* as amended in 1862 authorized the legislature to establish "recorder's or other inferior courts in any incorporated city or town;" and it was held, in view of the prior decisions in the State just cited, that the municipal criminal court of the city and county of San Francisco was an *inferior* court, and constitutional. *People v. Nyland*, 41 Cal. 129 (1871); *Stratman, In re*, 39 Cal. 517 (1870). An act "to provide for police courts in cities having 30,000 and under 100,000 inhabitants" sustained as against the constitutional objections that it was "a law of a general nature," and was "not uniform in its operation," and that its title was not sufficiently explicit and comprehensive. *People v. Henshaw*, 76 Cal. 436 (1888).

The *Hustings* Court of Richmond is constitutional. *Chahoon's Case*, 21 Gratt. (Va.) 822 (1871); *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673 (1870). Judiciary article of State Constitution of New York as to the jurisdiction of certain city courts construed. *Landers v. Staten Island Railroad Co.*, 53 N. Y. 450 (1873).

Under a *constitutional provision* declaring that "the *judicial power shall be vested* in a Supreme Court, in district courts, and in justices of the peace," an act conferring judicial powers on the mayor of a city was considered void, and it was held that for violations of its ordinances the corporation should resort to the judicial tribunals organized under the Constitution. *Lafon v. Dufrocq*, 9 La. An. 350 (1854). But see *The State v. Young*, 3 Kan. 445 (1866), where a provision in an organic act that the judicial power shall be vested exclusively in a Supreme Court, district, probate, and justice courts, was held not to prohibit the legislature from establishing municipal courts for the enforcement of municipal regulations and ordinances. And this seems to be the correct view. *Shafer v. Mumma*, 17 Md.

331. In *Hutchings v. Scott*, 4 Halst. (N. J.) 218 (1827), the objection was made that the legislature could not constitutionally confer the powers of *justices of the peace on the mayor, recorder, or aldermen of a city, or borough*, the argument being that since the Constitution provided for the appointment of justices of the peace only, and not for corporate officers, officers exercising the authority and powers of a justice of the peace should be appointed as such; but the objection was not sustained. In *Illinois*, mayors of cities cannot, it was held, be constitutionally invested with judicial power. *The State, &c. v. Maynard*, 14 Ill. 420; *Beesman v. Peoria*, 16 Ill. 484. By the general law of *Indiana* of 1857, for the incorporation of cities, mayors, in addition to their duties proper, have, "within the limits of cities, the jurisdiction and powers of a justice of the peace in all matters, civil and criminal, arising under the laws of the State, and for crimes and misdemeanors a jurisdiction co-extensive with the county." The Constitution of the same State (art. VII, sec. 16) declared that "no person elected to any *judicial office* shall, during the term, be eligible to any office of trust or profit under the State, other than a judicial office." One Wallace was elected mayor of Indianapolis, and within his term he resigned and received a majority of votes for sheriff of the county. It was held by the Supreme Court of *Indiana* (*Waldo v. Wallace*, 12 Ind. 569 (1859); *Gulick v. New*, 14 Ind. 93) that Wallace was a "judicial officer," and therefore ineligible to the office of sheriff; that the voters of the county were chargeable with *notice* of his ineligibility; that votes cast for him were therefore ineffectual, and that his competitor, having received the greatest number of *legal* votes, though not a majority of the ballots, was duly elected. Notwithstanding the great consideration which these cases received, the author ventures with great deference to state that it is by no means clear to his mind that the mayor was a "judicial officer," within the meaning of the Constitution. See, as bearing upon the above

was competent for the State legislatures to create municipal corporations with powers of local government, and to *authorize them to*

decision, and illustrative of the nature of the office of mayor, *Howard v. Shoemaker*, 35 Ind. 111 (1871); *Morrison v. McDonald*, 21 Me. 550 (1842); *State v. Maynard*, 14 Ill. 419 (1853); *Commonwealth v. Dallas*, 4 Dallas, 229; s. c. more fully, 3 Yeates (Pa.), 300 (1801); *State v. Wilmington*, 3 Harring. (Del.) 294 (1839). Authority of a mayor under a statute investing him with the powers of a justice of the peace. *State v. Perkins*, 4 Zab. (24 N. J. L.) 409; 1 Harr. (N. J.) 237; *Howe v. Plainfield*, 8 Vroom (37 N. J. L.), 145; *State v. Zeigler*, 3 Vroom (32 N. J. L.), 232; explained, *McConvill v. Jersey City*, 10 Vroom (39 N. J. L.), 38, 42; *Bain v. Mitchell*, 82 Ala. 304; *Robinson v. Benton County*, 49 Ark. 49. See *Baton Rouge v. Dearing*, 15 La. An. 208. A constitutional provision as to eligibility "to the office of judge of any court of the State," &c., and requiring a two years' residence "in the division, circuit, or county," was considered to have no reference to the office of recorder of a city. *The People v. Wilson*, 15 Ill. 389.

In *Michigan*, under constitutional provisions dividing the State into judicial circuits, and establishing circuit courts as the courts of general original jurisdiction, but authorizing the establishment, by the legislature, of municipal courts in cities: *Held*, that the original purpose of such municipal courts was not to destroy or materially change the jurisdiction of the circuits, but to relieve them of part of the increased litigation resulting from the growth of large cities. Such courts cannot have, in any class of cases, a jurisdiction territorially coextensive with the limits of the county, much less of the entire State. They were designed to meet the wants of the cities wherein they are established. A statute which gives a municipal court jurisdiction, where original process is served within the city, though neither party is a resident, or where service is had anywhere in the county, if plaintiff resides in the city, is unconstitutional and void. *Grand Rapids, N. & L. S. R. Co. v. Gray*, 38 Mich. 461 (1878).

The Constitution of *Nevada* provided that "the legislature may also establish courts for municipal purposes only, in incorporated cities and towns," and it was held that an act authorizing the city recorder to exercise the duties of committing magistrates in respect to offences against the public laws of the State was in conflict with the Constitution. *Meagher v. Storey Co.*, 5 Nev. 244. The Constitution of *Maryland* contains a provision that "the judicial power of the State shall be vested in a court of appeals, in circuit courts, in such courts for the city of Baltimore as may be hereafter prescribed, and in justices of the peace;" and it was held that the legislature might authorize municipal courts to try and punish disorderly persons and lewd women within the corporate limits, and generally to authorize the corporate authorities to exercise police powers, which were distinguished from the ordinary judiciary powers of the State. *Shafer v. Mumma*, 17 Md. 331 (1861). Further as to construction of Constitution of *Maryland* as to judicial powers of mayors. *Hagerstown v. Dechert*, 32 Md. 369 (1869).

Under the Constitution of *North Carolina* "special courts" are authorized "for the trial of misdemeanors in cities and towns where they may be necessary;" and it was held to be no objection to an act of the legislature that it did not authorize the officers of such court to try persons charged with misdemeanors, but only to bind them over. *State v. Pender*, 66 N. C. 313 (1872). But under the Constitution the legislature cannot confer upon mayors the judicial powers of justices of the peace in civil actions. *Edenton v. Wool*, 65 N. C. 379.

The amendment of the Constitution of *Massachusetts* of 1821 provided that "no judge of any court of this commonwealth shall at the same time hold the office of governor, &c., or have a seat in the senate or house of representatives." A judge of a police court for the city of Lynn was elected a member of the house of representatives, and took his seat as such. Police courts were created after the adoption

*adopt ordinances or by-laws, with appropriate penalties for their violation.* The power to do this includes, by fair implication, the power to authorize *violations of ordinances* (where the acts are not criminal in their nature, or within the meaning of constitutional provisions requiring an indictment and securing the right to a jury trial) to be tried and determined in a summary manner by a local or corporation tribunal.<sup>1</sup>

§ 429. **How and in what Name prosecuted.** — The *distinction between statute law and municipal by-laws* has been pointed out, and the subject of concurrent prohibitions of the same act by the general law and by the local ordinances of a municipality treated in the chapter on Ordinances. The distinction is there drawn, and is to be observed, between acts not essentially criminal, relating to municipal police and regulation, and those intrinsically criminal, and which are made punishable as public offences by the general laws of the State. The pecuniary penalties which are annexed to violations of the for-

of the constitutional amendment in question, and were vested at first with the same civil and criminal jurisdiction as justices of the peace. The courts thus established were organized judicial tribunals, having attributes and exercising judicial functions independently of the magistrates designated to hold them, and were thus distinguished from justices of the peace, on whom personally certain judicial powers are conferred by law; and the judges of such courts must, by the Constitution, be appointed during good behavior instead of for seven years, as in the case of justices of the peace. It was held that a *police court is a court of the commonwealth* within the constitutional amendment, and that the judge thereof vacated his office as such judge by accepting another official trust incompatible therewith. *Commonwealth v. Hawkes (quo warranto)*, 123 Mass. 525 (1878). Mr. Chief Justice Gray's opinion is highly instructive.

In *Wisconsin*, says Ryan, C. J., in *State v. Lockwood*, 43 Wis. 403 (1878), the right of trial by jury upon information or indictment for crime is secured by the Constitution, and cannot be waived; and the trial of an information by a judge of a municipal court without a jury was held not to be a legal trial, and the judgment of the municipal magistrate was declared to be void. The chief justice

says in substance that a plea of not guilty to an information or indictment for crime, whether felony or misdemeanor, puts the accused upon the country, and can be tried by a jury only. The rule is universal as to felonies; not quite so as to misdemeanors. But the current of authority appears to apply it to both classes of crime; and this court holds that to be safer and better alike in principle and practice. *Cooley's Const. Lim.* 319, 410, *n.*: *Proffatt's Jury Tr.* sec. 113; *Neales v. State*, 10 Mo. 498; *State v. Mansfield*, 41 Mo. 470; *Commonwealth v. Shaw*, 1 Pittsburg (Pa.), 492. In the latter case will be found a collection of authorities bearing on the question of waiver of the right to a jury trial in criminal cases.

The Constitution of *Illinois* of 1870 provides that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate." Under this provision the *vagrant act*, denying to persons arrested for vagrancy the right of trial by jury, was considered by *McAllister, J.*, in view of the previous legislation and constitutional provisions referred to by him, to be unconstitutional. *Scully and O'Leary, In re*, 11 *Chicago Legal News*, 27 (1878). See *ante*, sec. 401; *post*, sec. 433. Defendant may waive statute provision. *State v. Kaufman*, 51 Iowa, 578.

<sup>1</sup> *Infra*, sec. 432 *et seq.*; *ante*, sec. 368.

mer class, the legislature may, we think, authorize *the corporation to enforce in its own name*, by civil action or by complaint, and provision need not necessarily be made that they shall be prosecuted in the name of the people or of the State.<sup>1</sup>

<sup>1</sup> *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253; *Weeks v. Forman*, 1 Harrison (N. J.), 237; *Ewbanks v. Ashley*, 36 Ill. 177; *Williams v. Augusta*, 4 Ga. 509; *Floyd v. Commissioners*, 14 Ga. 354; *Kip v. Paterson*, 2 Dutch. (N. J.) 298; *Lewiston v. Proctor*, 23 Ill. 533; *State v. Jackson*, 8 Mich. 110. See *State v. Stearns*, 11 Fost. (31 N. H.) 106; *Goddard, Petitioner*, 16 Pick. (Mass.) 504; *Fink v. Milwaukee*, 17 Wis. 26; *ante*, secs. 411, 412 and cases; *post*, sec. 431 *et seq.*, and cases in notes. The legislature may enact that suits for the violation of municipal ordinances shall be prosecuted in the name of the people of the State. *Pillsbury v. Brown*, 47 Cal. 478 (1874).

The Constitution of the State of Iowa contains this provision: "The style of all process shall be 'The State of Iowa,' and all *prosecutions* shall be conducted in the name and by the authority of the same." Constitution of Iowa, Art. V. sec. 8. The charter of the city of Davenport in terms authorized *prosecutions* for violations of municipal ordinances to be instituted in the name of the city, and it was contended that this portion of the charter was in conflict with the above quoted provision of the Constitution. But the Supreme Court, in the case of *Davenport v. Bird*, 34 Iowa, 524 (1871), held otherwise. It was a prosecution in the name of the city against the defendant for a violation of an ordinance of a police nature, but for which, under the charter, the city was authorized to punish by a limited fine and imprisonment. In giving the opinion of the court, *Miller, J.*, says: "Is it necessary, under the Constitution, that all prosecutions for violations of municipal police ordinances shall be conducted *in the name and by the authority of the State of Iowa*? Or, in other words, is that clause of the city charter of Davenport, which directs that 'all suits, actions, and prosecutions be instituted, commenced, and prosecuted *in the name of the city of Davenport*,' in conflict

with the constitutional provision before referred to? We are of opinion that it is not. This clause of the Constitution occurs in Art. V., which treats of the judicial department of the government. This article vests and defines the judicial power of the State, establishes the tenure of office of the judges, and defines the mode of their election; fixes their salary and limits the number of judicial districts; provides for the election of an attorney-general, and other matters pertaining to the judicial arm of the State, among which is the clause under consideration. From all this it seems manifest that the requirement 'that all *prosecutions* shall be conducted in the name of "The State of Iowa,"' contemplates such criminal *prosecutions* as shall be instituted and prosecuted before the tribunals which are provided for in that article of the Constitution under the statutes of the State. It is fitting and appropriate that prosecutions for violations of the criminal laws of the State should be carried on in the name of the government. But there is no fitness or propriety in requiring the State to be a party to every petty prosecution under the police regulations of a municipal corporation. Such a construction of this article of the Constitution seems to us to be unwarranted, and not intended by the framers of the Constitution. It was held by the Supreme Court of *Pennsylvania* that the word '*process*,' in the 12th section of the 5th article of the Constitution of the State, which provides that 'the style of all process shall be the *Commonwealth of Pennsylvania*,' was intended to refer to such writs only as should become necessary to be issued in the course of the exercise of that *judicial power* which is established and provided for in the article of the Constitution, and forms exclusively the subject-matter of it. On the same principle, we are of opinion that the word '*prosecutions*,' in the 8th section of art. V. of our Constitution, was intended to refer only to such criminal prosecutions



§ 430 (359). **Constitutional Limitations on Jurisdiction; Powers.**—In creating local tribunals, however, and in prescribing their jurisdiction, the legislature should keep in view two cardinal considerations: *First*. That these inferior courts will have only such jurisdiction, and can exercise only such powers, as are *expressly* given or *necessarily* implied, and that fair doubts as to the extent of jurisdiction are resolved against the corporation; to this effect are all the authorities. *Second*. Regard must also be had to constitutional provisions intended to secure the liberty and to protect the rights of the citizen. The State Constitutions contain the substance of the clauses of *Magna Charta* to the effect that no citizen shall be deprived of life, liberty, or property but by the judgment of his peers or by the law of the land, and also provisions, more or less extensive, securing the right of trial by jury. These and other requirements of the fundamental law cannot be violated in acts of the legislature establishing and fixing the jurisdiction of the corporation court or tribunal.<sup>1</sup>

*Citizens competent to be Local Judges, Jurors, and Witnesses.*

§ 431 (360). **Municipal Judges, Jurors, and Witnesses.**—The maxim of the common law above adverted to, *that no one shall be a judge in his own case*,<sup>2</sup> has no just application to legislation creating municipal courts, and investing them with jurisdiction to try complaints for breaches of municipal ordinances. The mayor, though a citizen of the corporation, may be clothed with judicial powers of this character, and the inhabitants, though interested in a minute degree in the recovery, are, or at least may be declared, competent witnesses. In this respect the common-law rules have not been adopted and applied by the American courts to our municipal corporations;<sup>3</sup> or the courts have considered the common-law doctrine

under State laws as should be cognizable by the *judicial power*, which is established and provided for in that article, and that it was not intended to include prosecutions under ordinances of municipal corporations cognizable before local police magistrates." And the same view is held by the Court of Appeals of *Kentucky*. *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146 (1843). But in *Nebraska* the Constitution provides that "all process and other proceedings shall run in the name of the State," and this was held to include prosecutions under municipal ordinances, where the penalty was fine and

imprisonment; but *quære*. *Brownville v. Cook*, 4 Neb. 101 (1875). As to mode of enforcement of ordinances and requisites of complaints, *vide* chapter on Ordinances, secs. 408-412, and notes.

<sup>1</sup> *Zylstra v. Charleston*, 1 Bay (S. C.), 382 (1794); *Slaughter v. People*, 2 Doug. (Mich.) 334 (1842). *Ante*, sec. 427, note and cases; *post*, sec. 432. A municipal court cannot sit outside the limits of the city. *Hershoff v. Beverly*, 43 N. J. L. 139.

<sup>2</sup> *Supra*, sec. 425.

<sup>3</sup> *Thomas v. Mount Vernon*, 9 Ohio, 290 (1839); *Commonwealth v. Read*, 1

as to the disqualifying effect of interest upon jurors and witnesses as expressly or impliedly abrogated by the usual legislative or charter provisions for the constitution of municipal courts, and conferring upon them jurisdiction to hear and try certain actions and proceedings by and against the municipality. But a distinction has been well drawn between corporation courts proper and the general courts of record; and in respect of ordinary actions in the latter class of courts, a taxpayer of a municipality is incompetent to serve as a juror where the municipality is a party, unless made competent by legislative provision, expressly or by implication.<sup>1</sup>

Gray (Mass.), 475; *Lexington v. Long*, 31 Mo. 369 (1861); *Commonwealth v. Ryan*, 5 Mass. 90; *Cooley Const. Lim.* 410, 412; *Wheeling v. Black*, 25 W. Va. 266.

In the *City Council v. Pepper*, 1 Rich. (S. C.) Law, 364 (1845), the defendant, a non-resident of the city, was prosecuted in the city court, established by act of the legislature, for violation of a city ordinance. The defendant made the point that, as the judge of that court, the sheriff, and jurors were corporators, and therefore interested in the penalty, they were incompetent to try the cause. In holding this objection unsound, the Court of Appeals, after alluding to *Hesketh v. Braddock*, 3 Burr. 1847, cited *ante*, sec. 425, relied on by the defendant, remarks: "The statutory authority given to the city court to try all offenders against city ordinances impliedly declares that, notwithstanding the common-law objection, it was right and proper to give it the power to enforce the city laws against all offenders. The interest is too minute, too slight to excite prejudice against a defendant; for the judge, sheriff, and jurors are members of a corporation of many thousand members. What interest of value have they in a fine of twenty dollars? It would put a most eminent calculator to great trouble to ascertain the very minute grain of interest which each of these gentlemen might have. To remove so shadowy and slight an objection, the legislature thought proper to clothe the city court, consisting of its judge, clerk, sheriff, and jurors, with authority to try the defendant, and he cannot now object to it." *Per O'Neill, J.*, *City Council v. Pepper*, 1 Rich. (S. C.) Law, 364 (1845). *City Council v. King*,

4 McCord (S. C.) 487; *Corwein v. Hames*, 11 Johns. (N. Y.) 76 (1814). The mayor is not disqualified from presiding in the mayor's court, before which the proceedings are held, by the fact that he is the owner of a lot on the street sought to be widened. *Lexington v. Long*, 31 Mo. 369 (1861). The mayor and council having jurisdiction to declare what is a nuisance, the fact that they have employed an attorney to prosecute a case does not disqualify them, nor does the interest which they have in common with other citizens. *Montezuma v. Minor*, 73 Ga. 484.

<sup>1</sup> *Diveny v. Elmira*, 51 N. Y. 506 (1873). This was action of tort in the Supreme Court of the State against the city of Elmira for damages to the plaintiff caused by a defective sidewalk, which the city was bound to repair. The question was whether a taxpayer of the city was a competent juror. It was held by the Commission of Appeals that at common law the interest of such a juror would be a sufficient objection unless removed by statute, and that as respects the defendant city it had not been thus removed. Mr. Commissioner *Earl*, in delivering the judgment of the court, said: "The charter of Elmira provides for the election of justices of the peace, clothed with authority to hear and try actions in the same manner as justices of towns, and the city may sue before such justices to recover penalties and forfeitures, and such suits must be tried like civil actions before justices of towns. The defendants in such action may, of course, demand jury trials, and jurors must be summoned from the city, and cannot be summoned elsewhere. Hence, it may be well that in such actions before justices of the peace the incompetency of juries on

*Summary Proceedings may, in Certain Cases, be authorized. — Jury Trial.*

§ 432 (361). **Summary Procedure; Jury Trial.** — Proceedings for the violation of municipal ordinances are frequently summary in their character, and it has been made a question how far statutes or charters authorizing such proceedings are valid, especially where no provision is made for trial by jury. This must depend upon the nature of the act or omission, and upon the Constitution of the State and the extent to which the power of the legislature is therein restricted. Offences against ordinances properly made in virtue of the implied or incidental power of the corporation, or in the exercise of its legitimate police authority for the preservation of the peace, good order, safety, and health of the place and which relate to minor acts and matters not embraced in the public criminal statutes of the State, are not usually or properly regarded as *criminal*,<sup>1</sup> and hence need not necessarily be prosecuted by indictment or tried by a jury.<sup>2</sup> An act of the legislature authorizing the arrest

account of interest is, by implication, removed, for otherwise the justices would be practically deprived of jurisdiction to try the causes which are authorized to be commenced before them. *Commonwealth v. Ryan*, 5 Mass. 90. But there is no such practical difficulty in courts of record held in the city; and hence there is no reason for holding that in actions tried in them, in which the city is interested, the incompetency of jurors on account of interest has been removed. I therefore conclude that the common-law rule of incompetency on account of interest applied to these jurors, and that they were properly challenged and excluded. Whatever inconvenience may flow from such a holding may be remedied by the legislature. We must administer the law as we find it." 51 N. Y. 512. And it has also been elsewhere decided that in an action to recover damages against a municipality, a resident taxpayer is not competent to sit as a juror if challenged for cause. *Fulweiler v. St. Louis*, 61 Mo. 479 (1876); *Rose v. St. Charles*, 49 Mo. 509; *Johnson v. Americus*, 46 Ga. 80; but under the code of *Georgia* this rule does not obtain. *Cartersville v. Lyon*, 69 Ga. 577; see *Omaha v. Olmstead*, 5 Neb. 446 (1877). One who is specially interested in having a street

laid out held not disqualified to act as a juror in proceedings for the taking of private property for the purposes of the street. *Kundinger v. Saginaw*, 59 Mich. 355. See *Kemper v. Louisville*, 14 Bush (Ky.), 87.

By statute of *Massachusetts* an inhabitant of the city of Boston is competent as a juror in such cases, but this provision does not make a member of the common council of that city competent. *Boston v. Baldwin*, 139 Mass. 315. The inhabitants of a town are not disqualified from serving as grand jurors in presenting an indictment for forgery with intent to defraud the town, — the interest is too remote and is different from a direct financial interest. *Commonwealth v. Brown*, 147 Mass. 585 (1888). *Knowlton, J.*, reviews the cases and considers the question with care. Juror not disqualified to sit on a trial for a violation of the ordinance of his own city. *State v. Wells*, 46 Iowa, 662.

<sup>1</sup> *Ex parte Hollwedell*, 74 Mo. 395.

<sup>2</sup> *Williams v. Augusta*, 4 Ga. 509 (1848); approved, *Floyd v. Commissioners*, 14 Ga. 358 (1853); *Vason v. Augusta*, 38 Ga. 542 (1868); *post*, sec. 411, and notes; *State v. Gutierrez*, 15 La. An. 190; *Tierney v. Dodge*, 9 Minn. 166, 169; see *St. Peter v. Bauer*, 19 Minn. 327, 332, (1872), where

of professional thieves and burglars frequenting any railroad depot &c., in the city of Philadelphia, and their commitment by the mayor, without a trial by jury, is not in conflict with the provision of the Constitution of the State which guarantees "that trial by jury shall be as heretofore, and the right thereof remain inviolate."<sup>1</sup>

the text is cited and the subject considered by *Ripley*, C. J.; *Byers v. Commonwealth*, 42 Pa. St. 89; 1 Bish. Cr. Pr. sec. 758; *State v. Conlin*, 27 Vt. 318. Thus, in *New Jersey*, it is held that legislative authority to municipal courts to punish violations of ordinances by a limited fine and imprisonment, without providing for a trial by jury, is not in conflict with the constitutional provision that "the right of trial by jury shall remain inviolate." *McGear v. Woodruff*, 33 N. J. Law, 213 (1868); *Johnson v. Barclay*, 1 Harr. (N. J.) 1; s. p. *Howe v. Plainfield*, 8 Vroom (37 N. J. L.), 145; *People v. Justices*, 74 N. Y. 406; 18 Alb. Law Jour. 254 (1878); *ante*, secs. 366, 412, 413, 427 *et seq.*; *State v. Lee*, 29 Minn. 445; *Mankato v. Arnold*, 36 Minn. 62; *Ex parte Schmidt*, 24 S. C. 363 (quoting text); *Moundville v. Fountain*, 27 W. Va. 182, 204; *Hill v. Mayor of Dalton*, 72 Ga. 314; *Dively v. Cedar Falls*, 21 Iowa, 565; *Davenport G. L. & C. Co. v. Davenport*, 13 Iowa, 229; *State v. Topeka*, 36 Kan. 76; *Monroe v. Meuer*, 35 La. An. 1192; see also *Hollenbeck v. Marshalltown*, 62 Iowa, 21.

Treating of this subject, Mr. Sedgwick says: "Extensive and summary police powers are constantly exercised in all the States of the Union for the repression of breaches of the peace and petty offences; and these statutes are not supposed to conflict with the constitutional provisions securing to the citizens a trial by jury." Stat. and Const. Law, 548, 549; *Cooley Const. Lim.* 596. What offences may be proceeded against in England in a summary manner are determined by acts of Parliament, and the later acts include some cases of serious crime. 1 Stephen, Hist. Cr. Law, chap. iv. pp. 122-126. In *Williams v. Augusta*, *supra*, proceedings before a city council for violations of its ordinances, although punishable by fine, were considered not to be "criminal cases" within the meaning of the Constitution of

*Georgia*, vesting the jurisdiction of all criminal cases in tribunals other than corporation courts, the court being of opinion that the term "criminal cases," as used in the Constitution, had reference to such acts and omissions as are in violation of the public laws of the State, and not to violations of local ordinances made for the internal police and government of the city. In this State the settled rule is that the same act cannot be twice punished, — once by the municipality and once by the State, — and the rule is adopted that the municipal power ends where the right to indict under State authority exists, as any other rule would deprive the accused of the right to a jury trial. *Jenkins v. Thomasville*, 35 Ga. 145 (1866); *Vason v. Augusta*, *supra*; *Savannah v. Hussey*, 21 Ga. 80 (1857); *ante*, sec. 316, note. So in *Michigan*: *Slaughter v. People*, 2 Doug. (Mich.) 334 (1842). Otherwise in *Kentucky*: *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146 (1843). Where a charter vested in a municipal officer "all the power and jurisdiction given to trial justices" in the State, it was held that persons charged with violations of ordinances were entitled to a trial by jury and to an appeal. *Beaufort v. Ohlandt*, 24 S. C. 158; *Lexington v. Wise*, *Ib.* 163; *ante*, secs. 316, 366, 411, 428 *et seq.*

<sup>1</sup> *Byers v. Commonwealth*, 42 Pa. St. 89. In this case the extent of the right of trial by jury at common law is thoroughly examined in a valuable opinion by *Strong*, J., afterwards one of the justices of the Supreme Court of the United States, and the validity of summary convictions sustained. See chapter on Ordinances, *ante*, secs. 366, 408, 411. The doctrine may be considered as settled in *Pennsylvania* that municipal corporations are not within the constitutional guaranty of jury trial, and that the right to a trial by jury may be withheld by the legislature from new offences, and from new

§ 433. *Magna Charta*; The Fourteenth Amendment. — The *Fourteenth Amendment to the Constitution of the United States* contains a provision similar to that found in many of the State Constitutions, "that no *State* shall deprive any person of life, liberty, &c., without due process of law."<sup>1</sup> Thus the principles of *Magna Charta*, memorable in their assertion, historic in their associations, and luminous with the light of liberty, are part of the fundamental law of this country, and they cannot be contravened in the powers granted to municipalities, nor in the jurisdiction with which municipal courts are invested, or in the proceedings therein authorized.<sup>2</sup> One of the

*jurisdictions* created by statute without common-law powers, and from proceedings out of the course of the common law. *Rhines v. Clark*, 51 Pa. St. 96 (1865), *per Woodward*, C. J.; *Dunmore's Appeal*, 52 Pa. St. 374 (1866); *Ewing v. Filley*, 43 Pa. St. 384 (1862); *Van Swartow v. Commonwealth*, 24 Pa. St. 131 (1854). See *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253 (1831); *post.* sec. 438, and note. Such a constitutional provision does not apply in *New York* to petty offences made triable by statute before a court of special sessions. *People v. Justices*, 74 N. Y. 406 (1878); 18 Alb. Law Jour. 254. A different view is, to some extent, taken by the Supreme Court of *Vermont* under the Constitution of that State, whose language is, that "when an issue of fact proper for cognizance of a jury shall be joined in a court of law, the parties have a right to trial by jury which ought to be held sacred." In the opinion of the court, a public corporation, although the liability on the corporation be created by statute, is entitled to a jury trial, and therefore a statute providing for a compulsory and final reference of a case in its nature one at common law, is void; and the Constitution applies to all controversies fit to be tried by a jury, although the particular right was created by statute enacted after the adoption of the Constitution. *Plimpton v. Somerset*, 33 Vt. 283 (1860). It would, perhaps, be going too far to say that municipal corporations are not in any case within the constitutional guaranty of a trial by jury, and yet it would not follow that provision might not be made for the trial in a summary way, before municipal courts, of petty or police offences. *People v. Justices*, 74

N. Y. 406; 18 Alb. Law Jour. 254 (1878); *ante*, chap. iv.; *supra*, secs. 366-368, 411, 412; *infra*, secs. 434-438.

<sup>1</sup> Construed *Portland v. Bangor* (va-grants), 65 Me. 120 (1876); s. c. 20 Am. Rep. 681; *ante*, sec. 401.

<sup>2</sup> The words referred to in the text, in substance the same as Article 39 of *Magna Charta*, are the "essential clauses," being those that "protect the personal liberty and property of all freemen by giving security from arbitrary imprisonment and arbitrary spoliation." Hallam *Mid. Ages*, II. 324. "These three words [*nul-lus liber homo*] are worth," says Lord *Chatham*, "all the classics." In time they came to embrace every person in the realm. The eloquent eulogium of Sir *James Mackintosh* upon *Magna Charta* is well known. He justly says that whoever appreciates it "is sacredly bound to speak with reverential gratitude of the authors of the Great Charter. To have produced it, to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind." In enumerating its advantages and its blessings, it seems to the author that Sir *James* has omitted to notice its crowning glory, and that is its assertion of the principle of such priceless value to mankind which *Magna Charta* alike in its origin and in its general and specific provisions declares and illustrates, and which is the foundation principle of English and American liberty, viz.: that the Law as distinguished from arbitrary power or discretionary authority is supreme over all; that all persons from those in the highest station to the humblest individual are equally entitled to its protection and are equally bound to render it obedience; that all

questions which most frequently arises is whether the *defendant is entitled to a trial by jury*, and the cases on this subject cannot all be reconciled.<sup>1</sup> The general principles applicable to its solution, however, are plain. Violations of municipal by-laws proper, such as fall within the description of municipal police regulations, as for example those concerning markets, streets, waterworks, city officers, &c., and which relate to acts and omissions that are not embraced in the general criminal legislation of the State, the legislature may authorize to be prosecuted in a summary manner by and in the name of the corporation, and need not provide for a trial by jury. Such acts and omissions are not crimes or misdemeanors to which the constitutional right of trial by jury extends.<sup>2</sup>

In England violations of municipal by-laws where the penalty is a fine, or by authority of Parliament a fine and imprisonment, have always been prosecuted in a summary manner, although *Magna Charta* secures the right of trial by jury. Summary prosecutions, however, have always been, it is believed, in virtue of Acts of Parliament.<sup>3</sup> The distinction there is between offences known as *pleas of the crown*, where the trial must be by jury, and *petty offences* punishable by fine or amercement in the inferior jurisdictions.<sup>4</sup> And a by-law with appropriate penalties is not necessarily invalid, because the party may also be indicted for the same act.<sup>5</sup> So here where the act or omission sought to be punished by imprisonment under a municipal ordinance is in its nature not peculiarly an offence against the municipality, but rather against the public at large, and where it falls within the legal or common-law notion of a crime or misdemeanor, and especially where, being of such a nature, it is embraced in the criminal code of the State, then the constitutional guarantees intended to secure the liberty of the citizen and the right to a trial by jury cannot be evaded by the nature of the powers vested in the municipal corporation or the nature of the

men are governed by the general law of the land and by that alone, and are amenable only to that law as administered in the Judicial Courts; that the entire structure of our polity, Constitutions, and laws rests upon the right of the individual to the security and enjoyment of his freedom and his property; that the individual is everything and the government nothing except so far as it is an institution that protects his liberties and his rights.

<sup>1</sup> *Ante*, secs. 366-368, and cases in note; secs. 408-414, and notes; secs. 427, 428-432.

<sup>2</sup> Text quoted by the Supreme Court of the United States in *Callan v. Wilson*, 127 U. S. 540 (1888); where, however, the crime in question — conspiracy — was held not to be included in the class referred to in the text. See also *State v. Powell*, 97 N. C. 417, and *post*, sec. 439.

<sup>3</sup> 1 Stephen Hist. Crim. Law, chap. iv. p. 122.

<sup>4</sup> *Ante*, sec. 368, and authorities cited in note.

<sup>5</sup> Grant on Corp. 82; *ante*, sec. 368, note.

jurisdiction conferred upon the municipal courts.<sup>1</sup> If no imprisonment for the violation of the municipal regulation is authorized, it is clear that the prosecution is not criminal, and there is no constitutional right to a trial by jury. But if a limited imprisonment on default of paying a fine, or even as part of the punishment, is authorized by the legislature, this does not necessarily make the case, if it be for a violation of a mere municipal regulation, one to which the right of a trial by jury extends. The question depends rather, we think, upon the intrinsic nature of the offence. It is very generally agreed in this country that certain minor or petty offences may be summarily prosecuted and tried without indictment or a jury, but there is a class of cases so near boundary line that the courts have differed as to which side of it they belong.<sup>2</sup> On the principles

<sup>1</sup> *In re Rolfs*, 30 Kan. 758, quoting text, and holding that maintaining a nuisance—as keeping a hog-pen—being at common law a criminal offence for which fine and imprisonment may be imposed, one accused thereof is entitled to a jury, in a trial before a police-judge under an ordinance of the city. *Stebbins v. Mayer* (Kan.), 16 Pac. Rep. 745.

<sup>2</sup> *Ante*, secs. 366, 368 and note, 408 *et seq.*, 414, 427, 428. In England, under various Acts of Parliament from an early period, certain magistrates have been authorized “to inflict in a summary way penalties of different kinds upon a great variety of offenders. These penalties have consisted in the infliction of fines of greater or less amount, and sometimes in imprisonment, and occasionally in setting the offender in the stocks. Most offences created by legislation of this sort have consisted in the violation of rules laid down for some administrative purpose, and so belong rather to administrative law than to criminal law as usually understood.” 1 Stephen Hist. Cr. Law, chap. iv. p. 122. In the later acts in England the summary powers of magistrates “in cases of serious crimes have been considerably enlarged.” *Ib.* The following reference to some additional authorities, English and Canadian, respecting the question, *What is a crime?* is taken from Chief Justice Harrison’s Municipal Manual for the Province of Ontario (5th ed. 1878), p. 312:—

“If imprisonment may in the first instance follow the conviction, the proceed-

ing is in general looked upon as a criminal one. *Per Platt*, B., Attorney-General *v. Radloff*, 10 Exchq. 84. There are many crimes, properly so called, which are liable to be punished on summary conviction. 1 Steph. Hist. Cr. Law, chap. iv. p. 122. But there are a vast number of acts, which in no sense are crimes, which are also punishable; such, for instance, as keeping open house after certain hours, and a variety of breaches of police regulations which will readily occur to the mind of any one. *Per Baron Martin*, s. c. 96. Where the proceeding is conducted with a view and for the purpose of obtaining redress for the violation of a private right only, the proceeding is a civil one; but, on the other hand, where the proceeding is directed for the punishment of an offence which militates against the general interest of the community, and for the punishment of the infraction of some public duty, such proceeding is a criminal proceeding. *Per Sir Alexander Cockburn*, in arguing same case, p. 86. It is not an easy matter to draw a line, and so be able to decide on which side of it each case should be placed. Reference may be made to the following cases: Attorney-General *v. Bowman*, 2 B. & P. 532, n.; Attorney-General *v. Siddon*, 1 C. & J. 220; *Huntley v. Luscombe*, 2 B. & P. 530; *Rackham v. Bluck*, 9 Q. B. 691; *Cobbett v. Slowman*, 9 Exchq. 633; *Eggington, In re*, 2 E. & B. 717; *Sweeney v. Spooner*, 3 B. & S. 329; *Reeve v. Wood*, 5 B. & S. 364; Attorney-General *v. Sullivan*, 32 L. J. Exchq. 92; *Easton’s Case*,

here laid down those which most commonly present themselves may be satisfactorily determined.

§ 434. (362). **Criminal Charges; Jury Trial.** — Where the legislature undertakes to confer upon the courts of the corporation, or where the corporation seeks to give to its court *summary jurisdiction to try persons for acts which are indictable, or are criminal offences*, it not unfrequently happens that some provision of the Constitution, designed to protect the rights or liberty of the citizen, is violated. Thus, under a Constitution declaring "that no freeman shall be put to answer any criminal charge but by indictment," &c., and "that no freeman shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used," an act of the legislature which gives to an officer of an incorporated town the power of *trying assaults and batteries, or other crimes*, is, in the opinion of the Supreme Court of North Carolina, void, because it violates both of these provisions of the Constitution.<sup>1</sup>

§ 435 (363). **Same subject.** — A similar view was taken in the State of Arkansas, the Constitution of which provided that "no man shall be put to answer any criminal charge but by presentment, indictment, or impeachment;" and it was held that the legislature could not confer upon the corporation courts of a city *the power to punish an assault and battery* — this being a criminal charge — without presentment or indictment; and it was consequently decided that the judgment of conviction of such a court for an assault and battery is *coram non judice*, and constitutes no bar to a prosecution by indictment in the courts of the State for the same offence.<sup>2</sup>

12 A. & E. 645; *Cattell v. Ireson*, E., B. & E. 91; *Morden v. Porter*, 7 C. B. N. S. 641; *Herne v. Garton*, 2 E. & E. 66; *Parker v. Green*, 2 B. & S. 299; *Lucas & McGlashan, In re*, 29 Upper Can. Q. B. 81; *The Queen v. Boardman*, 30 Upper Can. Q. B. 553; *The Queen v. Roddy*, 41 Upper Can. Q. B. 291."

<sup>1</sup> *State v. Moss*, 2 Jones (N. C.) Law, 66 (1854). See *Tierney v. Dodge*, 9 Minn. 166 (1864). The Constitution of *Louisiana* (art. 103) requires that "prosecutions shall be by indictment or information. The accused shall have a speedy trial by an impartial jury of the vicinage." Another article (124) provides that

"the mayors, recorders, &c., may be commissioned, and the legislature may vest in them such criminal jurisdiction as may be necessary for the punishment of minor crimes and offences, as the police and good order of the city of New Orleans may require." It was held that art. 103 laid down the general rule, to which art. 124 was an exception, and that under the latter article it was competent for the legislature to provide for the prosecution of minor offences, without indictment or jury trial, in the Recorder's Court. *State v. Gutierrez*, 15 La. An. 190 (1860).

<sup>2</sup> *Rector v. State*, 6 Ark. (1 Eng.) 187



§ 436 (364). **Same subject.** — The same doctrine was declared in Michigan. The Constitution of the State contained a provision that "no person shall be held to answer for a *criminal offence* unless on the presentment of a grand jury, except cases cognizable by justices of the peace," &c.; and by the statutes of the State, the *keeping of a bawdy-house* was declared to be an offence punishable by fine and imprisonment. Under this state of the law the city of Detroit was empowered by the legislature "to make all such by-laws and ordinances as may be deemed expedient by the common council for effectually preventing and suppressing houses of ill-fame within the limits of the city." It was held that the term "criminal offence" in the Constitution included both felonies and misdemeanors, and embraced the offence (which was such both at common law and by the statute of the State) of keeping a house of ill-fame; and therefore an ordinance of the common council prescribing the punishment for keeping such a house within the city and providing for the trial and conviction of the offenders in the municipal court *without indictment*, was unconstitutional, the judgment of the court resting upon the principle that, under the constitutional provision quoted, there could be no summary conviction under an ordinance for *that* which is a criminal offence by the general laws of the State.<sup>1</sup>

§ 437 (365). **Same subject.** — So, by the Constitution of Texas, it is provided that "in all cases in which justices of the peace or

(1845); *Durr v. Howard*, 6 Ark. 461; *Lewis v. State*, 21 Ark. 211. It is held in the same State that a corporation court may punish a person for using obscene language in the streets, because such an offence is not declared criminal by any statute of the State. *Slattery, In re*, 3 Ark. 484.

<sup>1</sup> *People v. Slaughter*, 2 Doug. (Mich.) 334 (1842), note; and see *Welch v. People*, *Ib.* 332 (1846). Under the present Constitution of *California* an ordinance prohibiting persons from visiting, for purposes of prostitution, houses of ill-fame, was sustained, the same "not being in conflict with the general laws" of the State. *Re Johnson*, 73 Cal. 228 (1887). So as to ordinance to suppress tippling-houses. *Re Campbell*, 74 Cal. 20 (1887). So as to ordinance making it unlawful to visit a place for the practice of gambling. *Lane, Ex parte*, 76 Cal. 587. But otherwise

as to an ordinance against opium dens, as precisely the same acts are made punishable by the Penal Code. *Re Sic*, 73 Cal. 142 (1887). In *Kentucky*, the Constitution of which provides that "no person shall, for any indictable offence, be proceeded against criminally by information," and that "all prosecutions shall be carried on in the name and by the authority of the commonwealth," the legislature may authorize a city corporation to proceed in its name against offenders for violating its ordinances, and punish them by fine, although the offence, as in the case before the court (an assault and battery), is indictable under the laws of the State. The court regarded the proceeding in the name of the corporation as of a *quasi* civil or penal nature, and not as criminal. *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146 (1843); *ante*, secs. 88, 411, 429; *supra*, sec. 432, note.

inferior tribunals shall have jurisdiction of causes where the penalty is fine and imprisonment (except in cases of contempt), the accused shall have the right of trial by jury," and under this it was held that the mayor's court could not constitutionally be invested with power to try summarily, and without a jury, *a person for assault and battery*, in violation of the ordinances of the corporation, where the mayor was authorized to impose a fine.<sup>1</sup>

§ 438 (366). **Same subject.**—In *Zylstra v. The Corporation of Charleston*, it appeared that the organic act of the city gave to the common council power to affix and levy fines for all offences against their by-laws, and there was no limitation of the *amount* of the fines. In this respect the charter was silent. The "Court of Wardens" (the corporation tribunal) had the power expressly given to it to commit for fines and penalties. Under these circumstances the corporation of Charleston passed an ordinance prohibiting the exercise of the trade of candle and soap making within the limits of the city, under a penalty of £100. Zylstra was prosecuted in the Court of Wardens—composed of members of the city council—for a violation of this by-law, and fined by this court £100. On his motion to obtain a *prohibition* it was held, under the Constitution of that State, that the proceedings of the Court of Wardens were void, not being according to the *lex terræ* recognized by *Magna Charta*, and expressly adopted by the State Constitution. And the judges who expressed themselves on that point were of opinion, under the State Constitution, that that tribunal could not be invested with a jurisdiction greater than that exercised by justices of the peace, unless there was provision for securing a trial by jury, which in the instance before the court had not been made.<sup>2</sup>

<sup>1</sup> *Burns v. La Grange*, 17 Texas, 415 (1856); *s. p.* *Smith v. San Antonio*, *ib.* 643.

<sup>2</sup> *Zylstra v. Charleston*, 1 Bay (S. C.), 382 (1794).

In holding that the charter of the city of Lancaster did not confer upon the councils the right to vest in the mayor and aldermen jurisdiction to convict summarily, and imprison in default of payment of the penalty affixed to an ordinance, *Gibson, C. J.*, remarked: "Now, if the charter even purported to confer a power to imprison on summary conviction (for a misdemeanor) and without appeal to a jury, it would be so far unconstitutional

and void." *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253 (1831).

A statute providing for *summary* conviction for a new offence before inferior jurisdictions, without a jury, does not violate the provision of the Constitution that "trial by jury shall be as heretofore, and the right thereof remain inviolate." *Van Swartow v. Commonwealth*, 24 Pa. St. 131 (1854). *Ante*, sec. 432, note; *Rhines v. Clark*, 51 Pa. St. 96. See, also, *Boring v. Williams*, 17 Ala. 510; *Times v. The State*, 26 Ala. 165; *Powers, In re*, 25 Vt. 261; *Murphy v. People*, 2 Cow. (N. Y.) 815; *Shirley v. Lunenburg*, 11 Mass. 379.

§ 439 (367). **Where the Right of a Jury Trial is given by Appeal.**—It has, however, been decided in the courts of several of the States that although the charge or matter in the municipal or local courts be one in respect of which the party is by the Constitution entitled to a trial by jury, yet if by an appeal, clogged with no unreasonable restrictions, he can have such a trial as a matter of right in the appellate court, this is sufficient, and his constitutional right to a jury trial is not invaded by the summary proceeding in the first instance.<sup>1</sup> The Supreme Court of the United States has, however, very recently emphatically disapproved of this doctrine, in a case where the charge against the defendant was criminal in its nature, affecting the public at large, and was not one of the class of petty offences which, at the common law, may be proceeded against summarily, without a jury.<sup>2</sup> The question came before the court upon an application for the writ of *habeas corpus* in favor of one who had been convicted in the Police Court of the District of Columbia, of the offence of *conspiracy*, without a jury which he had duly demanded.<sup>3</sup> The distinction is sharply

As to the right, under particular constitutional and statutory provisions, to a jury trial, for violations of municipal by-laws. *Thomas v. Ashland*, 12 Ohio St. 124; *Work v. State*, 2 Ohio St. 296; *Gray v. State*, 2 Harring. (Del.) 76 (1836); *Low v. Commissioners of Pilotage*, R. M. Charl. (Ga.) 302; *Green v. Savannah*, *Id.* 368, 371; *Williams v. Augusta*, 4 Ga. 509. Approved, *Floyd v. Eatonton Comm'rs*, 14 Ga. 354 (1853); *State v. Guttierrez*, 15 La. An. 190; *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382 (1869); *Anderson v. O'Donnell*, 7 Southeast. Rep. 524. *Ante*, secs. 427, 432.

*Jurisdiction of mayor's, recorder's, and police courts under statutes or special charters.* *Commonwealth v. Pindar*, 11 Met. (Mass.) 539; *Commonwealth v. Roark*, 8 Cush. (Mass.) 210; *Same v. Emery*, 11 Cush. (Mass.) 406; *Elder v. Dwight Manufacturing Co.*, 4 Gray (Mass.), 201; *State v. Ricker*, 32 N. H. 179; *Myers v. People*, 26 Ill. 173; *Rice v. State*, 3 Kan. 141; *State v. Young*, 3 Kan. 445; *Malone v. Murphy*, 2 Kan. 250; *Gray v. State*, 2 Harring. (Del.) 76; *Hutchings v. Scott*, 4 Halst. (N. J.) 218; *Cincinnati v. Gwynne*, 10 Ohio, 192; 14 Ohio, 250, 403; *Markle v. Akron*, 14 Ohio, 586; *Weeks v. Forman*, 1 Harris. (N. J.) 237; *Truchelut v.*

*City Council*, 1 Nott & McC. 227; *Thornton v. Smith*, 1 Wash. (Va.) R. 106; *McMullen v. City Council*, 1 Bay (S. C.), 46; *Zylstra v. Charleston*, *Id.* 382; *Willis v. Boonville*, 28 Mo. 543; *Fayette v. Shafroth*, 25 Mo. 445; *Sill v. Corning*, 15 N. Y. 297; *Landers v. Staten Island Railroad Co.*, 53 N. Y. 450 (1873); *Goodrich v. Brown*, 30 Ia. 291 (1870); *Pennsylvania Hall, In re*, 5 Pa. St. 204 (1847); *Alexander v. Bennett*, 60 N. Y. 204 (1875).

*Extent of jurisdiction territorially.* *State v. Clegg*, 27 Conn. 593; *Covill v. Phy* (process), 26 Ill. 432; *State v. McArthur*, 13 Wis. 383; *Hoag v. Lamont*, 60 N. Y. 96 (1875).

<sup>1</sup> *Stewart v. Mayor*, 7 Md. 501; *Morford v. Barnes*, 8 Yerger (Tenn.), 444; *McDonald v. Schell*, 6 Serg. & Rawle (Pa.), 240; *Beers v. Beers*, 4 Conn. 535; *Jones v. Robbins*, 8 Gray (Mass.), 329; *Dorgan v. Boston*, 12 Allen (Mass.), 223; *Sedg. St. and Const. Law*, 549; *Cooley Const. Lim.* 410. Text cited and followed. *Emporia v. Volmer*, 12 Kan. 622, 631 (1874); *post*, sec. 813.

<sup>2</sup> *Callan v. Wilson*, 127 U. S. 540 (1888).

<sup>3</sup> *Callan v. Wilson*, *supra*. Mr. Justice Harlan, delivering in this case the opinion of the court, said: "It [conspiracy] is an

drawn by the Supreme Court in the case cited, between offences essentially criminal, affecting the public at large, and petty offences which at the common law may be proceeded against in a summary manner, which latter would include violations of municipal ordinances concerning local affairs in respect of matters non-criminal in their nature. This distinction would appear to be sound, and the doctrine of the Supreme Court is consonant with the established and traditionary regard of our jurisprudence for the rights of the citizen and for the trial by jury in criminal cases. To this extent only is the doctrine of the Supreme Court in necessary conflict with the judgments of the State courts referred to in the text.<sup>1</sup>

**§ 440 (368). Revisory Power of the Superior Courts; Review of Proceedings by Superior Tribunals.**— With respect to inferior jurisdictions, the right to review their proceedings by the superior tribunals will not be taken away unless the intention

offence of a grave character, affecting the public at large, and we are unable to hold that a person charged with having committed it in this District is not entitled to a jury, when put upon his trial. The jurisdiction of the Police Court, as defined by existing statutes, does not extend to the trial of infamous crimes or offences punishable by imprisonment in the penitentiary. But the argument made in behalf of the government, implies that if Congress should provide the Police Court with a grand jury, and authorize that court to try, without a petit jury, all persons indicted— even for crimes punishable by confinement in the penitentiary— such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried and sentenced in the Police Court, is given an unobstructed right of appeal to, and trial by jury in, another court to which the case may be taken. We cannot assent to that interpretation of the Constitution. Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name,

or by or under the authority, of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution. When, therefore, the appellant was brought before the Supreme Court of the District, and the fact was disclosed that he had been adjudged guilty of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty." The Supreme Court of the District had previously expressed its doubt upon the question. *In re Fry*, 3 Mackey, (D. C. 135. See also *In re Dana*, 7 Benedict, 1.

<sup>1</sup> It is certainly very difficult to define in view of the English legislation what are such petty offences. 1 Stephen, Hist. Cr. Law, chap. iv. p. 122, where the history and character of such legislation are given.

of the legislature to this effect is expressed with unequivocal clearness. The authorities cited in the note will show the great length to which the courts go in preserving the right to review the proceedings of subordinate tribunals, administered frequently by men without professional or judicial knowledge or experience. A declaration by the statute concerning an inferior tribunal, that its proceedings "shall be *final and conclusive*," or "*without appeal*," &c., will not deprive a party of the right of review by *certiorari*, error, or the proper proceeding.<sup>1</sup> But where it is

<sup>1</sup> *Rex v. Commissioners*, 2 Keeble, 43; *Rex v. Moreley*, 2 Burr. 1040; *Lawton v. Commissioners*, 2 Caines (N. Y.), 179, 181; *Starr v. Trustees*, 6 Wend. (N. Y.) 564; *People v. Mayor*, 2 Hill (N. Y.), 9; *Tierney v. Dodge*, 9 Minn. 166; *Heath, In re*, 3 Hill (N. Y.), 42, 52, and cases cited and reviewed by *Cowen, J.*; *Camden v. Bloch*, 65 Ala. 236.

A kindred subject is treated in the chapter on Municipal Officers: "Special Tribunal to determine Election Contests for Municipal Offices," *ante*, sec. 200, and it is there shown that the ordinary constitutional provision that the judicial power shall be vested in certain courts does not disable the legislature from providing that the council of municipal corporations may finally determine the validity of the election of corporation officers. *New Orleans v. Morgan*, 7 Martin (La.), n. s. 1, — 9 Martin, repr. 381; *State v. Fitzgerald*, 44 Mo. 425 (1869); *Ewing v. Filley*, 43 Pa. St. 384; *State v. Johnson*, 17 Ark. 407. But the supervisory jurisdiction of the superior courts will not be held to be taken away by mere negative words. *Grier v. Shackleford*, Const. Rep. 642; *State v. Fitzgerald*, *supra*; *Commonwealth v. McCloskey*, 2 Rawle (Pa.), 369; *Strahl, In re*, 16 Iowa, 369; *State v. Funck*, 17 Iowa, 365; *Bateman v. Megowan*, 1 Met. (Ky.) 533; *Wammack v. Holloway*, 2 Ala. 31; *Hummer v. Hummer*, 3 G. Greene (Iowa), 42; *State v. Marlow*, 15 Ohio St. 114; *Attorney-General v. Corporation of Poole*, 4 Mylne & Cr. 17; *Attorney-General v. Aspinall*, 2 Mylne & Cr. 613; *Parr v. Attorney-General*, 8 Cl. & F. 409; *Taylor v. Americus*, 39 Ga. 59; *State v. Kempf*, 69 Wis. 470; *post*, chaps. xx. xxi., xxii.; *post*, sec. 926.

The Supreme Court of *Michigan*, in reviewing, on *certiorari*, the legality of a conviction of a defendant in the recorder's court on a complaint for violating a municipal ordinance, speaking of the extent of the *revisory power of the superior tribunals*, and the nature and purposes of the municipal tribunals, says: "The power of reviewing upon *certiorari* judicial proceedings of inferior tribunals and bodies not according to the course of the common law has been long exercised in England, as well as in this country. The power has been jealously maintained, and has been deemed necessary to prevent oppression. There are certain classes of questions which, by common understanding, from time immemorial belong to the course of the judicial inquiry under the laws of the land. The common law and the various charters and bills of rights recognized and assured the right to such an inquiry; and the Constitution, in apportioning the judicial power, as well as in affirming the immunity of life, liberty, and property, has always been understood to guarantee to each citizen the right to have his title to property, and other legal privileges, determined by the general tribunals of the State. These municipal courts, so far as they act under city by-laws, are not designed to decide between man and man, or to administer general laws. They are ordained to prevent disorder in matters of local convenience, and to regulate the use of public and *quasi* public easements, so as to prevent confusion. If in exercising this power they can incidentally decide upon the rights of private property so as to determine its enjoyment without review, there would seem to be a practical annihilation of the right to resort to the general tribunals and the common law."

declared with respect to a court of general and superior jurisdiction, as of the Supreme Court of New York, that its action (for example, in confirming appraisements for opening streets, or under a railroad act) "shall be *final and conclusive* upon the parties interested and upon all other persons," the right of appeal, which would otherwise exist, from the decision of such court to a still higher tribunal, as to the Court of Appeals, is destroyed.<sup>1</sup> A charter provision to the effect that appeals and writs of error from judgments of the mayor, in cases arising under the charter, should only be allowed in cases where the fine was over five dollars, was considered as evincing the legislative intention that in cases where the fine was under that sum the judgment should be final, and hence a writ of prohibition will not lie to restrain its collection, nor can it be reviewed on *certiorari*.<sup>2</sup>

§ 441 (369). **Same subject.**—In Virginia it is decided that in a proceeding before the mayor or a justice to impose a penalty on a party for obstructing a street, the mayor or justice cannot, if the defendant *bona fide* sets up title to the land claimed as a street, inquire into the validity of the claim, the court holding that by the principles of the common law (which are not changed by the statutes), a *bona fide* assertion of title to property or to an incorporeal hereditament or real franchise ousted the jurisdiction of these inferior magistrates or tribunals.<sup>3</sup>

*Per Campbell, J., Jackson v. People*, 9 Mich. 111, 117 (1860). Further see chap. xxii. *post*, sec. 925 *et seq.*

An appeal from inferior tribunals does not exist unless plainly given. *People v. Police Justice*, 7 Mich. 456; *Conboy v. Iowa City*, 2 Iowa, 90; *Muscatine v. Steck*, 7 Iowa, 505; *Dubuque v. Reberman*, 1 Iowa, 444; *McGarty v. Deming*, 51 Conn. 422, where, however, the charter denied the right of an appeal. *Certiorari*, on the other hand, will lie unless plainly denied, or other specific remedy be given. *Cunningham v. Squires*, 2 West Va. 422 (1865); *post*, sec. 611, and chap. xxii. on Remedies against Illegal Corporate Acts, *post*.

<sup>1</sup> Canal and Walker Streets, *In re*, 12 N. Y. (2 Kern.) 406 (1855); *New York, Central R. Co. v. Marvin*, 11 N. Y. (1 Kern.) 276.

<sup>2</sup> *Wertheimer v. Boonville*, 29 Mo. 254 (1860).

<sup>3</sup> *Warwick v. Mayo*, 15 Gratt. (Va.) 528 (1860). To the same effect, see *Jackson v. People*, 9 Mich. 111 (1860); *Grand Rapids v. Hughes*, 15 Mich. 54 (1866). See chapter on Streets. What record of conviction before corporation officers or courts should show. *Keeler v. Milledge*, 4 Zab. (24 N. J. L.) 142; *Muscatine v. Steck*, 7 Iowa, 505; *Buck v. Danzenbacker*, 8 Vroom (37 N. J. L.), 359; *St. Peter v. Bauer*, 19 Minn. 327 (1872); *Goldthwaite v. Montgomery*, 50 Ala. 486 (1874). See chap. xxii. *post*.

A town officer who holds in custody a person committed by a verbal order of a police magistrate for non-payment of a fine imposed for the breach of a town ordinance, acts not only without authority but in violation of law. *Odell Trustees v. Schroeder*, 58 Ill. 353 (1871).

## CHAPTER XIV.

## CONTRACTS.

§ 442 (370). **Subject outlined.** — The *mode of enforcing the contracts* of municipal corporations will be considered hereafter.<sup>1</sup> In this chapter we shall treat, in the order below indicated, of the power of such corporations to make contracts of different kinds, the mode of exercising the power, and the effect of transcending it.

1. Extent of Power to contract, and how conferred — secs. 443–448.

2. Mode of exercising the Power — sec. 449.

3. Seal not necessary unless required — May be concluded by Vote or Ordinance — secs. 450, 451.

4. When Corporation bound by Contracts made by Agents — Mode of Execution — secs. 452–456.

5. Contracts beyond Corporate Powers void — *Ultra Vires* a Defence — secs. 457, 458.

6. Implied Contracts — When Deducible — secs. 459, 460.

7. Ratification of Unauthorized Contract — secs. 463–465.

8. Provision requiring Letting to Lowest Bidder — secs. 466–470.

9. Contract of Suretyship — sec. 471.

10. Rights and Liabilities as respects Authorized Contracts — Illustrations — Cases mentioned — Power to settle Disputed Claims — To give Extra Compensation — To employ Attorneys — secs. 472–479.

11. Contracts for Public Works — Rights of Contractors — secs. 480–483.

12. Same — Corporate Control under Stipulation to that effect — secs. 480–483.

13. Evidences of Indebtedness — Negotiable Bonds — secs. 484, 485.

14. Ordinary Warrants or Orders — Their Legal Nature — secs. 487, 488.

15. Liability of Indorsers thereof — sec. 489.

<sup>1</sup> See *post*, chaps. xx., xxii., xxiii. contracts made by municipal corporations. Legislative power over and in respect of See chaps. iv., vii., and viii., *ante*.

16. Payment and Cancellation of Orders and Warrants,—sec. 500.

17. Rights and Remedies of Holders thereof—secs. 501, 502.

18. Defences thereto—*Ultra Vires*—Fraud—Want of Consideration—sec. 504.

19. Orders payable out of a Particular Fund—sec. 505.

20. Interest on Corporate Indebtedness—sec. 506.

21. Railroad Aid Bonds—Course of Decision in U. S. Supreme Court—secs. 511–515.

22. Leading Cases in National Supreme Court on the Subject noticed—secs. 521–534.

23. Decisions in State Courts referred to—Conclusions stated—secs. 550–554.

§ 443 (371). **Extent of Power to make Contracts; and how conferred.**—In determining *the extent of the power* of a municipal corporation to make contracts, and in ascertaining *the mode* in which the power is to be exercised, the importance of a careful study of the charter or incorporating act, and of the general legislation of the State on the subject, if there be any, cannot be too strongly urged. Where there are express provisions on the subject, these will, of course, measure, as far as they extend, the authority of the corporation. The power to make contracts, and to sue and be sued thereon, is usually conferred, in general terms, in the incorporating act. But where the power is conferred in this manner it is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary and usual, fit and proper, to enable the corporation to secure or to carry into effect the purposes for which it was created; and the extent of the power will depend upon the other provisions of the charter prescribing the matters in respect of which the corporation is authorized to act. To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is, indeed, an *implied or incidental authority* to contract obligations, and to sue and be sued in the corporate name.<sup>1</sup>

<sup>1</sup> 1 Kyd, 69, 70; 2 Kent Com. 224; Angell & Ames, secs. 110, 271; Galena v. Corwith, 48 Ill. 423 (1868); Straus v. Eagle Ins. Co., 5 Ohio St. 59 (1855); Chaffee v. Granger, 6 Mich. 51; Douglass v. Virginia City, 5 Nev. 147 (1869); Goodrich v. Detroit, 12 Mich. 279; Bank of Columbia v. Patterson, 7 Cranch, 299 (1813); Siebrecht v. New Orleans, 12 La. An. 496 (1857); Bateman v. Ashton-nnder-Lyne, 3 H. & N. 322 (1858); Nowell

v. Worcester, 9 Exch. 457 (1854). Indianapolis v. Indianapolis Gas Co., 66 Ind. 396, approving text; Montgomery County v. Barber, 45 Ala. 237 (1871); Smith v. Stephan, 66 Md. 381; Galveston v. Loonie, 54 Tex. 517.

Under general authority to make all contracts necessary for its welfare, a city may contract for *water-works*. Cabot v. Rome, 28 Ga. 50; see Wells v. Atlanta, 43 Ga. 67. A contract granting the exclu-



### § 444. Contracts with Municipal Officers; Fiduciary Relations.—

It is a well established and salutary doctrine that he who is en-

*sive right to furnish water* to a city, made under a power "to provide a supply of water," sustained, and the city was enjoined from granting the right to lay pipes to another company, on the ground that its power was exhausted. *Atlantic City Water-Works v. Atlantic City*, 39 N. J. Eq. (12 Stew.) 367. See Index, titles, *Monopolies; Water and Water-Works*. Duty and power of municipality as owner of *water-works*. *McKnight v. New Orleans*, 24 La. An. 412 (1872); *Grant v. Davenport*, 36 Iowa, 396 (1873); *Hale v. Houghton*, 8 Mich. 458. May contract for *lighting streets, &c.*, *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396. For *grading streets*. *Sturtevant v. Alton*, 3 McLean, 393. To *build sidewalks*. *Wyandotte v. Zeitz*, 21 Kan. 649; *Lawrence v. Killam*, 11 Kan. 512, approving text. For "*breakwater*" to protect streets of a city on the lake. *Miller v. Milwaukee*, 14 Wis. 642; approved, *arguendo*, by *Cole, J.*, in *Clason v. Milwaukee*, 30 Wis. 316, 321 (1872). *Supra*, sec. 261, note. *Legislative power over municipal contracts*. *Ante*, chap. iv.; *Grant v. Davenport*, 36 Iowa, 396 (1873). *Post*, sec. 544.

The city of Richmond possessed, under its charter, all the powers of municipal corporations, including the power "to contract and be contracted with," and its council was specially empowered "to pass all by-laws which they shall deem necessary for the peace, comfort, convenience, good order, good morals, health, or safety of the city, or of the people or property therein." In April, 1865, in anticipation of the evacuation of the city by the confederate army and the entry of the national forces, the *city council ordered the destruction of all the liquor in the city*, and pledged the faith of the city for the payment of its value. It was decided by the Court of Appeals that under the provision of the charter above mentioned the council had authority to make the order and pledge, and hence the city was responsible for the value of liquor destroyed under the order of the council. *Jones v. Richmond*, 18 Gratt. (Va.) 517 (1868). The same question upon the same resolu-

tions of the city council was presented to the United States Supreme Court in *Richmond v. Smith*, 15 Wall. 429 (1872); and it followed, without examination into its correctness, the exposition of the charter given by the State court in *Jones v. Richmond, supra*. Upon the general principles of construction, the author doubts whether the order for the destruction of the liquors was within the scope of the corporate powers of the city. *Ante*, secs. 89, 90, 91, and notes. Contract made by a city, under government therein set up by the United States military authority, held valid. *Prather v. New Orleans*, 24 La. An. 41. Special *prohibition* in a city charter construed to extend to *all contracts of sale* to the city. *Gregory v. Jersey City*, 5 Vroom (34 N. J. L.), 390. Where an executory contract with a municipal corporation is not in its nature necessarily personal, as, for example, a contract for cleaning streets, it may, certainly with the assent, express or implied, of the city, *be assigned*, if there be no restriction on the right, and the city retains the personal obligation of the original contractor and of his sureties. *Devlin v. New York*, 63 N. Y. 8 (1875).

No corporation can make a valid contract *not to exercise part of the franchise* committed to it by the State for public purposes. *St. Louis v. St. Louis Gaslight Co.*, 5 Mo. App. 484, 529. See opinion of the Supreme Court of *Missouri* on Appeal, in the case last cited; and see *ante*, secs. 96, 97, 357, and *post*, secs. 716, 780; see also Index, title *Delegation of Public Powers*.

In *The Maggie P.*, 25 Fed. Rep. 202, it appeared that the city of St. Louis, which, by its charter, had *general control over the harbor and improvements therein*, including power "to keep the wharf and the river along the shore free from wrecks and other improper obstructions," entered into a contract with the owner of a steamboat which had sunk, to use the city's harbor boat in pumping out the wreck, for a consideration; and the question was presented whether the city could be held liable for damages caused by its failure to carry out

trusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend on reasoning technical in its character, and is not local in its application. It is based upon principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails.<sup>1</sup> The law will in no case permit persons who have undertaken a character or a charge to change or invert that character by leaving it and acting for themselves in a business in which their character binds them to act for others. The application of the rule may in some instances appear to bear hard upon individuals who have committed no moral wrong; but it is essential to the keeping of all parties filling a fiduciary character to their duty, to preserve the rule in its integrity, and to apply it to every case which justly falls within its principle.<sup>2</sup> The principle generally applicable to all officers and

the contract. *Brewer, J.*, said: "I suppose a city can make no contract for the discharge of a purely public duty, — such a contract as in case of performance it can enforce compensation for, or for non-performance expose itself to liability. It cannot use public funds in any such direction. . . . At the same time, when it has in its possession instrumentalities, and hires employees for the purpose of discharging some public duty, I see no reason why, when the exigencies of public duties do not require the use of those instrumentalities and employees, it may not make a valid contract to use them in some private service. . . . And, generally speaking, when public duty does not interfere with private service, a city may make a valid contract for the use of its instrumentalities in the latter. . . . The testimony shows that the city, through its officers, has been in the habit of making these contracts and receiving compensation therefor; and having made that a business, so to speak, having received gain from such contracts, it does not lie in its mouth to say now that there was no officer authorized by ordinance to make this kind of contract."

<sup>1</sup> *Toronto v. Bowes*, 4 Grant (Canada), 504, where the subject is fully considered. In some of the States statutes have been

enacted declaring void all contracts made by municipal corporations with their officers. In *Indiana* such a statute was strictly enforced. *Case v. Johnson*, 91 Ind. 477; approved *Benton v. Hamilton*, 110 Ind. 294.

<sup>2</sup> *Port v. Russell*, 36 Ind. 60; s. c. 10 Am. Rep. 5; *Board of Comm'rs v. Reynolds*, 44 Ind. 509; s. c. 15 Am. Rep. 245; *Macon v. Huff*, 60 Ga. 221; *York Buildings Co. v. Mackenzie*, 8 Brown, P. C. 42; *Liquidators, &c. v. Coleman*, L. R. 6 E. & I. App. C. 189; *Aberdeen R. Co. v. Blaikie*, 1 Macq. App. Cases, 461. See full review of authorities in *Gardner v. Ogden*, 22 N. Y. 332; *Butts v. Wood*, 37 N. Y. 317, and cases cited; *McGregor v. Logansport*, 79 Ind. 166; *Fort Wayne v. Rosenthal*, 75 Ind. 156; *Emigrant Co. v. Wright Co.*, 97 U. S. 339 (1877). In this case the Supreme Court of the United States, by Mr. Justice *Miller*, in declaring a contract void, say: "It appears that for some time before this contract was made the county had been urging her claim to swamp lands before the department at Washington, through Mr. S. who acted as her agent. A short time before this contract was made Mr. S. informed the authorities of the county that their claim had been rejected, and that this rejection was accompanied by the announcement of

directors of a corporation is that they cannot enter into contracts with such corporation to do any work for it, nor can they subsequently derive any benefit personally from such contract.<sup>1</sup> To deny the application of the rule to municipal bodies would, in the opinion of the Canadian chancery court, whose views we adopt and approve, be to deprive the rule of much of its value; for the well working of the municipal system, through which a large portion of the affairs of the country are administered, must depend very much upon the freedom from abuse with which they are conducted. Nothing can more tend to correct the tendency to abuse than to make abuses unprofitable to those who engage in them, and to have them stamped as abuses in courts of justice. The tendency to abuse may indeed be in part corrected by public opinion; but public opinion itself is acted upon by the mode in which courts deal with such abuses as are brought within their cognizance. Accordingly, where in the case just referred to, the *mayor of a city secretly contracted to purchase at a discount, a large amount of the debentures of the city*, which were expected to be issued under a future by-law of the city council, and was himself afterwards an active party in procuring and giving effect to the by-law which was subsequently passed, the court of chancery held him to be a trustee for the city of the profit he derived from

a rule which left but little to hope for on the part of the county. Very shortly after this Mr. C., as the agent of the emigrant company, made his appearance in Wright County and procured the contract we have mentioned. As soon as this was done, Mr. S., as the agent of the emigrant company, by the assistance, as he says, of able lawyers, and in the cases of other counties with whom the company had similar contracts, inaugurated proceedings to procure the reversal of the rule announced by the department. Succeeding in this he presented the renewed claim of Wright County, and secured the allowance of several hundred acres still unsold in the county, and money and scrip for six thousand acres to be located elsewhere in lieu of swamp lands sold by the government. It is not a violent presumption, under all the circumstances of this case, that when, just after Mr. S. had made the impression on the supervisors of Wright County that their case was hopeless, Mr. C. appeared in Wright County, he had some information of a different character on which he acted, and which was not communicated

to the supervisors. We are not convinced that any false representations were made by the agents or officers of the emigrant company. But the impression made upon us by the whole testimony is that the officers and citizens of the county were in gross ignorance of the nature and value of what they were selling; that the emigrant company, on the other hand, were well informed in regard to both, and withheld this information unfairly from the officers of the county. *That the sudden change of the relationship of Mr. S. from an unsuccessful agent of the county to a successful agent of the company requires an explanation which has not been satisfactorily given. That the fact that all parties knew they were dealing with a trust fund devoted by the donor to a specific purpose demanded the utmost good faith on the part of the purchaser.* That so far from this there is a provision for a diversion of the fund to other purposes, a gross inadequacy of consideration, and a successful speculation at the expense of the rights of the public."

<sup>1</sup> Cases, *supra*, note 2.

the transaction.<sup>1</sup> So, where a member of a municipal corporation agreed with another party to take a contract from the corporation for the execution of certain works in his name, the profits whereof were to be divided between the parties, it was held that such a contract was in contravention of law, and the court of chancery refused to enforce the agreement for a partnership.<sup>2</sup> An action at law on a contract for the sale of goods by a trading partnership, of which a member is also a member of the municipal council, may, where the contract is not executed, be resisted on the ground that one of the plaintiffs is a member of the municipal council.<sup>3</sup> A distinction to be borne in mind is this: if the contract is void as against public policy or is *ultra vires* in the true and strict sense of that expression, there can be no recovery based on the executory provisions of the contract; but if it has been executed in whole or in part, there may be an estoppel or other ground of recovery based upon what has been done. It is obvious, however, that when such is the case the right of recovery is not upon the contract, but upon facts and circumstances independent of the notion that the contract is valid.<sup>4</sup>

<sup>1</sup> *Toronto v. Bowes*, 4 Grant (Canada), 504.

<sup>2</sup> *Collins v. Swindle*, 6 Grant (Canada), 282; *Cummings v. Saux*, 30 La. An. 207; *Doll v. State*, 45 Ohio St. 445.

<sup>3</sup> *Brown v. Lindsay*, 35 Upper Can. Q. B. 509. A contract made by a mayor, while in office, *with the city council*, to lease a city park for five years, and for an annual sum paid him to keep the park in repair, —Held, to be against public policy and void. *Macon v. Huff*, 60 Ga. 221. But after such contract had been ratified by a subsequent mayor and council, and large sums expended by the contractor in fencing, draining, and ornamenting the park, a court of chancery will not set aside the contract without compelling the city to do equity. *Id.* The New York Commission of Appeals regarded an act of the legislature making it unlawful for a member of the common council to become a contractor under any contract authorized by the council, and declaring such contract to be void at the instance of the city, as but declaratory of the common law, which on grounds of public policy, prohibits a trustee from contracting with himself. Accordingly where the plaintiff, a member of the council, voted for a resolution to appropriate money to

celebrate the Fourth of July, under which resolution a committee of the members employed the plaintiff to furnish horses and carriages for the celebration, it was held (assuming the appropriation of money for this purpose to be valid under the charter) that the plaintiff's employment was against public policy and void, and that he could not recover against the city for the fair value of the use of the horses and carriages furnished by him. *Smith v. Albany*, 11 N. Y. 444 (1875). But a contract entered into with an officer of the corporation, whereby such officer agreed to keep the streets in repair, was held valid. *Albright v. Chester T. C.*, 9 Rich. (S. C.) Law, 399. See, also, *Central R. & B. Co. v. Claghorn*, Speers Eq. 545, 562; *ante*, sec. 283, note; sec. 292; *Lawrence v. Killam*, 11 Kan. 499 (1873).

<sup>4</sup> *Thomas v. West Jersey R. R. Co.* 101 U. S. 71; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290. Compare *Hitchcock v. Galveston*, 96 U. S. 341, quoted *infra*. The cases, however, are conflicting upon the point whether the recovery may not be upon the contract, if there be a right of recovery at all. In *Morawetz on Corporations* (2d ed.) secs. 648, 653, 689–706, the leading authorities as to private corporations are collected and

§ 445. **Powers of Public Agents and Officers to make Contracts.** — Public corporations may by their officers and properly authorized agents make contracts the same as individuals and other corporations, in matters that appertain to the corporation; being artificial persons, they cannot contract in any other way.<sup>1</sup> Public officers or agents are held more strictly within their prescribed powers than private general agents; and a contract made by a public agent within the apparent scope of his powers does not bind his principal in the absence of actual authority.<sup>2</sup> There is a broad distinction between the acts of an officer or agent of a public municipal corporation and those of an agent for a private individual. In cases of public agents the public corporation is not bound unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed in his capacity as a public agent to make the declaration or representation for the government.<sup>3</sup>

§ 446. **Contracts in Respect of Drainage.** — Although the general doctrine is that a municipal corporation *cannot usually exercise its powers beyond its corporate limits*, yet this right may be given either expressly or by implication; and a city with *express authority to provide drainage* was held, in the absence of any restriction, to possess the implied power, in order to find an outlet for sewage beyond its limits, to make a contract with an adjoining landowner giving it such an outlet.<sup>4</sup>

§ 447 (372). **Implied and Incidental Powers; Market Powers; All persons bound to take Notice of Extent of Corporate Powers.** — If a municipal corporation *is authorized to erect markets*, it may contract to buy, or may receive a grant of, land on which to place market buildings, and it may make contracts for the erection of market-houses. As it is the general practice, in granting municipal charters and in general acts for the incorporation of towns and cities, to enumerate their powers and define their duties, it will suffice in this place to remark generally that the authority to enter into contracts necessary and proper to carry into effect their powers and discharge their duties *is impliedly given* to such corporations. But this implied authority is only co-extensive with

commented on. See *ib.* secs. 621, 718, as to municipal corporations.

<sup>1</sup> *Louisville City R. Co. v. Louisville*, 8 Bush (Ky.), 415 (1871).

<sup>2</sup> *Parsel v. Barnes*, 25 Ark. 261; *Williams v. Peyton's Lessee*, 4 Wheat. 77.

<sup>3</sup> *Baltimore v. Musgrave*, 48 Md. 272; *infra*, sec. 450, note.

<sup>4</sup> *Coldwater v. Tucker*, 36 Mich. 474 (1877); s. c. 24 Am. Rep. 601. *Ante*, secs. 354, 355, 356, as to extent of corporate jurisdiction.

the powers and duties of the corporation; and if any greater authority is claimed it must be sought for in an express or special grant from the legislature. It is scarcely necessary to observe that no contract can be made by a corporation which is *prohibited* by its charter or by the statute law of the State.<sup>1</sup> And it is a general and fundamental principle of law that *all* persons contracting with a municipal corporation must *at their peril inquire into the power* of the corporation or of its officers to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation.<sup>2</sup> This principle is more strictly applied, and properly so, than in the law of private

<sup>1</sup> Jackson v. Bowman, 39 Miss. 671 (1861); Indianapolis v. Indianapolis Gas Co., 66 Ind. 396, citing text. Contracts to violate the charter, or to bargain away or restrict the free exercise of legislative discretion, vested in a municipality or its officers, in reference to public trusts, are void. *Ib.*; Thomas v. Richmond, 12 Wall. 349 (1870), in which notes issued by the city to circulate as money in contravention of law were adjudged void, and the city held not to be liable either in special or general assumpsit; Morgan v. Menzies, 60 Cal. 341. In this case the statute having exempted cities, &c. from giving bond in civil actions, a bond in attachment proceedings given by a city was held void. *Ante*, secs. 89-92, and cases there cited; *post*, sec. 487, and cases cited.

<sup>2</sup> Marsh v. Fulton County, 10 Wall. 676 (1870); *ante*, sec. 89; *infra*, sec. 457; Leavenworth v. Rankin, 2 Kan. 357 (1864); Wyandotte v. Zeitz, 21 Kan. 649; Horn v. Baltimore, 30 Md. 218 (1868); Bridgeport v. Housatonic R. Co., 15 Conn. 475, 493; Haynes v. Covington, 13 Sm. & Mar. (21 Miss.) 408 (1850); Taft v. Pittsford, 23 Vt. 286 (1856); Montgomery City Council v. M. & W. P. R. Co., 31 Ala. 76 (1857); Pa., D. & M. Steam Nav. Co. v. Dandridge, 8 Gill & J. (Md.) 248, 319; Hodges v. Buffalo, 2 Denio (N. Y.), 110; Baltimore v. Eschbach, 18 Md. 276, 282 (1861); Baltimore v. Reynolds, 20 Md. 1; Dill v. Wareham, 7 Met. (Mass.) 438 (1844); Branham v. San Jose, 24 Cal. 585, 602; McCoy v. Brant, 53 Cal. 247, approving text; Sturtevant v. Alton, 3 McLean, 393 (1844); Wallace v. San Jose, 29 Cal. 180; State v. Mayor, 29 Md. 85, 111 (1868); Bateman

v. Ashton, 3 Hurl. & Nor. 323; State v. Haskell, 20 Iowa, 276; Baltimore v. Musgrave, 48 Md. 472; People v. Baraga, 39 Mich. 554; Neely v. Yorkville, 10 S. C. 141, approving text; Bryan v. Page, 51 Tex. 532; Baby v. Baby, 5 Upper Can. Q. B. 510; Richmond v. Municipality, 8 Upper Can. Q. B. 567; Campbell v. Elma, 13 Upper Can. C. P. 296; Standly v. Perry, 23 Grant (U. C.), 507; Craycraft v. Selvage, 10 Bush (Ky.), 696 (1874); Treadway v. Schnauber, 1 Dak. Ter. 236; Ouachita P. J. v. Monroe, 37 La. An. 641; Laycock v. Baton Rouge, 35 La. An. 475; Keating v. Kansas, 84 Mo. 415. Within the scope of its power a corporation may contract to do an act *at any place* other than the one where it is located. Bank of Utica v. Smedes, 3 Cow. (N. Y.) 662; Maddox v. Graham, 2 Met. (Ky.) 56. Or *prospective* in its terms. Davenport v. Hallowell, 10 Me. 317. As to *corporate seal*. *Ante*, sec. 190. Where a public corporation, transcending its legal power, assumes to direct its officers—for example, commissioners of highways—to bring an action in their own names, or in their name of office, against third persons for trespasses upon the highways, and the action is accordingly brought and the officers are defeated, they cannot sustain an action against the corporation to be reimbursed their costs and expenses; and the reason is, that the action of a corporation directing *such a suit* to be brought, being in excess of its lawful power, is void, and cannot be the foundation of any contract, express or implied. Cornell v. Guilford, 1 Denio (N. Y.), 510; *ante*, sec. 147.

corporations. So, also, those *dealing with the agent of a municipal corporation* are likewise bound to ascertain the nature and extent of his authority. This is certainly so in all cases where this authority is special and of record, or conferred by statute. The fact that in such a case the agent made false representations in relation to his authority and what he had already done, will not aid those who trusted to such representations, to establish a liability on the part of his corporate principal.<sup>1</sup>

§ 448. **Scope of Power to Contract.** — Although it is true, as stated in the last section, that a contract made by a municipality in violation of an express legislative prohibition is void, yet, in the absence of special legislative restriction, the municipal authorities possess the same power as other debtors to make a new contract in any proper form, purging the former contract of its illegality. This principle is distinctly affirmed and well illustrated in a judgment by the Supreme Court of the United States. A city, in violation of local statutes forbidding the *issue, circulation, or receipt of scrip or currency intended to circulate as money*, issued such currency, engraved in the similitude of bank-paper, and by means

<sup>1</sup> *Baltimore v. Eschbach*, 18 Md. 276, 282; *Baltimore v. Reynolds*, 20 Md. 1 (1862); *Delafield v. State of Illinois*, 2 Hill (N. Y.), 159, 174; 26 Wend. (N. Y.) 192 (1841); affirming s. c., 8 Paige, 531, restraining unauthorized sale of bonds. *Hodges v. Buffalo*, 2 Denio (N. Y.), 110; 3 Comst. 430; 2 Barb. 104; *Supervisors, &c. v. Bates*, 17 N. Y. 242 (1858). This case also determines how far, in such a case, the sureties of such an agent or officer are liable for his acts. And see cases cited *Id.* p. 245. *Chemung Canal Bank v. Chemung Co. Sup.*, 5 Denio, 517; *Overseers, &c. of Norwich v. Overseers, &c. of Pharsalia*, 15 N. Y. 341; *Albany v. Cunliff*, 2 Comst. 178, *per Strong, J.*; *Marsh v. Fulton Co.*, 10 Wall. 676 (1870); *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543 (1869); *Swift v. Williamsburg*, 24 Barb. (N. Y.) 427; *Hague v. Philadelphia*, 48 Pa. St. 527; *State v. Mayor, &c.*, 29 Md. 85, 111; *Horn v. Baltimore*, 30 Md. 218 (1868); *Thomas v. Richmond*, 12 Wall. 349 (1870), *per Bradley, J.*; *Ford v. Mayor, &c. of New York*, 63 N. Y. 640 (1875); *Stoneburgh v. Brighton*, 5 Upper Can. L. J. 38; *Bellevue v.*

*Hohn*, 82 Ky. 1; *Farnsworth v. Pawtucket*, 13 R. I. 82.

Special and limited authority to *borrow money conferred upon the town treasurer*, when exercised, is exhausted, and the town is not liable for money he subsequently borrows and converts to his own use, although he assumed to act, and was, by the lender, supposed to be acting under the authority conferred upon him. *Savings Bank v. Winchester*, 8 Allen (Mass.), 109 (1864); *ante*, sec. 117.

So in Upper Canada it is held that an individual dealing with a corporation through its council or the members of the governing body, is *bound to notice* the objects and limits of their powers, and the manner in which those powers are to be exercised, since their acts, when beyond the scope of their authority or done in a manner unauthorized, are in general nugatory and not binding on the corporation. *Ramsay et al. v. The Western District Council*, 4 Upper Can. Q. B. 374; *Silsby v. Dunville*, 31 Upper Can. C. P. 301; *Harr. Manual* (5th ed.) p. 12; *Mora-wetz on Corp.* (2d ed.) secs. 621, 718.

thereof paid valid debts against itself; subsequently the holders of this illegal currency, at the instance of the city, surrendered the same, and received therefor new obligations of the city in the forms of bonds, to which there was no legal objection except that the consideration was illegal; it was held by the Supreme Court of the United States that the city was liable on the new bonds.<sup>1</sup>

§ 449 (373). **Mode of exercising the Power.**—Respecting the mode in which contracts by corporations should be made, it is important to observe that when, as is sometimes the case, the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive and must be pursued, or the contract will not bind the corporation;<sup>2</sup> but the courts have sometimes regarded

<sup>1</sup> *Little Rock v. Merchants' National Bank*, 98 U. S. 308 (1878); s. c. below, 5 Dillon, 299. The statement of the text as to the substance of the statutes of *Arkansas* in this regard is accurate. Mr. Justice *Hunt* supported the judgment of the Supreme Court of the United States by the following argument:—

"It can scarcely be doubted that whoever is capable of entering into an ordinary contract to obtain or receive the means with which to build houses or wharves or the like, may, as a general rule, bind himself by an admission of his obligation. The capacity to make contracts is at the basis of the liability. The first liability of the city was disputed by it. It had gone beyond its power, as it said, in making a debt in the form of bank-notes. If it had not denied its power, judgment and an execution might have gone against it, and the creditor would have obtained his money. This privilege of non-resistance every person retains, and continues to retain. He can reconsider at any time, and confess and admit what the moment before he denied. In 1874 the city of *Little Rock* did reconsider. It said, 'We will purge the transaction of its illegality. We had the authority to accept from you in satisfaction of amounts received by us for legitimate purposes the sums in question. We did so receive and expend for legitimate purposes. We erred in making the payment to you in an objectionable form. We now pay our just and lawful debt by cancelling the bank-

notes issued by us, and delivering to you obligations in the form of bonds, to which form there is no legal objection.'" See, also, *Hitchcock v. Galveston*, 96 U. S. 350; *Nashville v. Ray*, 19 Wall. 468; *Police Jury v. Britton*, 15 Wall. 570; *Mullarky v. Cedar Falls*, 19 Iowa, 24; *Sykes v. Lafferry*, 27 Ark. 407; *Wright v. Hughes*, 13 Ind. 113. See also the cases cited *post*, sec. 487, note. Where a city borrowed money of a bank upon its note at usurious interest, and the bank had subsequently cancelled the illegal note, had refunded the excessive interest, and received a new note for a lawful amount, the new note is valid. *Miller v. Hull*, 4 Denio (N. Y.), 104; *Kent v. Walton*, 7 Wend. (N. Y.) 256. So it has been held that where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate the contract. *Washburn v. Franklin*, 35 Barb. (N. Y.) 599; 13 Abb. P. R. 140, same case. *Infra*, sec. 487, note.

<sup>2</sup> *People v. Weber*, 89 Ill. 347; *Bryan v. Page*, 51 Tex. 532, approving text; *Francis v. Troy*, 74 N. Y. 338; *State v. Passaic*, 41 N. J. L. 90; *Perrine v. Farr*, 2 Zab. (22 N. J. L.) 356; *Carron v. Martin*, 2 Dutch. (N. J.) 594; *State v. Hudson*, 5 Dutch. (N. J.) 104; *State v. Marion County*, 21 Kan. 419; *Garvey, In re*, 77 N. Y. 523; *Smith v. Newburgh*, 77 N. Y. 130; *Allen v. Galveston*, 51 Tex. 302; *Dore v. Milwaukee*, 42 Wis. 18; *Butler v. Nevin*, 88 Ill. 575; *Kansas City v. Flanagan*, 69 Mo. 22; *Bentley v. County Comm'rs*, 25 Minn. 259; *Fulton v. Lincoln*,



provisions on this subject as directory. Thus, where the charter directed the mode in which moneys should be drawn from the treasury to be by an *order* of the council, signed by the mayor, such an order, issued upon a memorandum in the minutes of the corporation, without a formal order being entered, was adjudged a sufficient compliance with the charter.<sup>1</sup> But unless the mode be prescribed and limited, valid contracts within the scope of the corporate powers may be made, as we shall see, otherwise than under seal or in writing. A contract with a municipal corporation, which by its terms is not to be performed within one year

9 Neb. 358; Hurford v. Omaha, 4 Neb. 350; Reis v. Graff, 51 Cal. 86; Addis v. Pittsburgh, 85 Pa. St. 379; McDonald v. Mayor, &c. of New York, 68 N. Y. 23 (1876); s. c. 23 Am. Rep. 144; Leavenworth v. Rankin, 2 Kan. 357; McCoy v. Brant, 53 Cal. 247, approving text; Murphy v. Louisville, 9 Bush (Ky.), 189 (1872); *post*, sec. 481, note; Montgomery County v. Barber, 45 Ala. 237; Terre Haute v. Lake, 43 Ind. 480; Head v. Prov. Ins. Co., 2 Cranch, 127 (1804). White v. New Orleans, 15 La. An. 667; *infra*, sec. 466; Dey v. Jersey City, 19 N. J. Eq. 412 (1869); Baltimore v. Reynolds, 20 Md. 1; Town of Durango v. Pennington, 8 Col. 257; Worthington v. Covington, 82 Ky. 265; Laycock v. Baton Rouge, 35 La. An. 475; North Pac. L. & M. Co. v. E. Portland, 14 Oreg. 3; Los Angeles Gas Co. v. Toberman, 61 Cal. 199. Speaking of this subject in a case above cited, *Marshall*, C. J., says: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and *when it prescribes to them a mode of contracting*, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." Approved, Bank of United States v. Dandridge, 12 Wheat. 64, 68 (1827); see, also, Angell & Ames Corp. sec. 253; Diggle v. Railway Co., 5 Exch. 442; Homersham v. Wolv., &c. Co., 4 Eng. Law & Eq. 426; Frend v. Dennett, 4 C. B. (N. S.) 576; Butler v. Charlestown, 7 Gray (Mass.), 12; Trustees v. Cherry, 8 Ohio St. 564 (1858); Bladen v. Philadelphia, 60 Pa. St. 464; McCracken v. San Francisco, 16 Cal. 591; Pimental v. San Francisco, 21 Cal.

351; Zottman v. San Francisco, 20 Cal. 96; Argenti v. San Francisco, 16 Cal. 255, 282, opinion of *Field*, C. J.; *post*, chapter on Taxation and Local Assessments. If a corporation sue upon a contract though it be executory on their part, and not executed, this amounts to a conclusive admission that the contract was duly entered into by them. Grant on Corp. 63; 5 Man. & G., 192. A contract by a city with a street railway company held not concluded, something remaining to be done. People's Pass. R. Co. v. Memphis City R. Co., 10 Wall. 38. Where a charter limits the exercise of power the mayor and council cannot, in a different mode, make a valid contract, nor can they, by any subsequent approval or conduct, impart validity to such contract, nor would the law imply any such contract: the law never implies an obligation to do that which it forbids the party to agree to do. Bryan v. Page, 51 Tex. 532; s. p. Francis v. Troy, 74 N. Y. 338. In the absence of proof of bad faith, or of a usurpation of authority, or that a public loss or private injustice will result from a contract made by a municipal council without complying strictly with charter provisions, the State will not be warranted in interfering to set it aside. Attorney-General v. Detroit, 55 Mich. 181.

<sup>1</sup> Kelley v. Mayor, &c. of Brooklyn, 4 Hill (N. Y.), 263 (1843); see Neiffer v. Bank, 1 Head (Tenn.), 162; Pennington v. Taniere, 12 Q. B. 998, 1013; Maddox v. Graham, 2 Met. (Ky.) 56; *ante*, sec. 291. Under charter, executory contracts for grading, &c., must be in writing. Starkey v. Minneapolis, 19 Minn. 203 (1872).

from the making thereof, is within the statute of frauds; but an entry in the official minutes of the corporation of a resolution passed by the governing body expressing the terms of the contract, signed by the clerk, constitutes a note or memorandum in writing sufficient to take the case out of the statute and to bind the corporation.<sup>1</sup>

§ 450 (374). **Seal not Necessary; How concluded.**—Modern decisions have established the law to be, that the contracts of municipal corporations *need not be under seal* unless the charter or other legislative enactment so requires.<sup>2</sup> The authorized body of a municipal corporation *may bind it by an ordinance*, which in favor of private persons interested therein may, if so intended, *operate as a contract*; <sup>3</sup> or they may bind it by a *resolution*, or by *vote* clothe its officers, agents, or committees, with power to act for it; and a contract made by persons thus appointed by the corporation, though by parol (unless it be one which the law requires to be in writing), will bind it.<sup>4</sup>

<sup>1</sup> *Argus Co. v. Albany*, 55 N. Y. 495 (1874), *Grover and Rapallo, J.J.*, dissenting. Municipal corporations may contract by parol through their duly authorized agents, and such contracts cannot be changed without the consent of the parties to be affected thereby. *Duncombe v. The City of Fort Dodge*, 38 Iowa, 281 (1874).

<sup>2</sup> *Draper v. Springport*, 104 U. S. 501; *Halbut v. Forrest City*, 34 Ark. 246. A written proposal by a town to have work done, a written bid to do it and a written acceptance of the bid, held to constitute together a sufficient contract. *Wiles v. Hoss*, 114 Ind. 371 (1887).

<sup>3</sup> The obligation of a contract, made by an ordinance, cannot be impaired by a *subsequent ordinance*, though it be authorized by a new city charter. *Ante*, sec. 314. So where the revenues of a market were, by ordinance, appropriated to pay municipal bonds, a later ordinance passed under a power granted by a new charter, diverting the revenues, was declared void. *Fazende v. Houston*, 34 Fed. Rep. 95. *Ante*, sec. 314, as to repeal; and chaps. iv. and vii., *passim*, as to extent of legislative power over Municipal Corporations.

<sup>4</sup> *Fanning v. Gregoire*, 16 How. (U. S.) 524 (1853); *ante*, sec. 192; *Abbey v. Bilups*, 35 Miss. 618; *Alton v. Mulledy*,

21 Ill. 76 (1859); *Western Sav. F. Soc. v. Philadelphia*, 31 Pa. St. 175; *Id.* 185; *Clark v. Washington*, 12 Wheat. 40 (1827); *Hamilton v. Newcastle & D. R. Co.*, 9 Ind. 359; *Ross v. Madison*, 1 Ind. 281 (1848); *Bellmyer v. Marshalltown*, 44 Iowa, 564 (1876); *Chattanooga v. Geiler*, 13 Lea, 611; where a contract is accepted unconditionally by the resolution of a city council the proceedings by which the resolution was adopted are presumed to be regular. *Over v. Greenfield*, 107 Ind. 231. Not essential that vote of directors appear on the record. *Story Agency*, sec. 52, where it is said that, "as the appointment of an agent of a corporation may not always be evidenced by written vote, it is now the settled doctrine—at least in America—that it may be inferred and implied from the adoption or recognition of the acts of the agent by the corporation." *Post*, sec. 459. And when this is the case an action of assumpsit lies against such corporation upon an express or implied promise. *Post*, sec. 459. *Parol contract* by council with city physician. *Selma v. Mullen*, 46 Ala. 411 (1871). See also, *Broom Com.* on Com. Law, 561-570; *Montgomery Co. v. Barber*, 45 Ala. 237 (1877).

In *Fleckner v. United States Bank*, 8 Wheat. (U. S.) 338, 357 (1823), it was

§ 451 (375). **Mode of exercising Power.** — The assent of a municipal corporation to the variation or modification of a contract need not necessarily be expressed by the formal action or resolution of the common council; but it may be implied from acts relating to the contract work subsequent to the date of the contract;<sup>1</sup> but

urged that a corporation could not authorize any act to be done by an agent by a mere vote of the directors, but only by an appointment under its corporate seal. But the court declared that such a doctrine, whatever may have been its original correctness as applied to common-law corporations, had "no application to modern corporations created by statute, whose charters contemplate the business of the corporation to be transacted by a special body or board of directors. And the acts of such a body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the utmost solemn acts done under the corporate seal." *Per Story, J.* Further, as to common seal, see *ante*, sec. 190. Authority of agent, in absence of special restriction, may be given by parol or inferred from acts. *Detroit v. Jackson*, 1 Doug. (Mich.) 106. See *ante*, sec. 190; *infra*, sec. 459.

A provision in the organic act of a city, that "on the passage of every by-law or order to enter into a contract by the council, the ayes and nays shall be called and recorded," prescribes how the order to contract shall be made and evidenced when directed by the council, but it is not a limitation on the power of authorized agents to make a contract by parol. *Indianola v. Jones*, 29 Iowa, 282 (1870); *ante*, sec. 291; *Baker v. Johnson Co.* (parol contract), 33 Iowa, 151.

Contract may be concluded by ordinance or action of the council (accepting proposals), without signature by parties. *People v. San Francisco*, 27 Cal. 655 (1865); *Sacramento v. Kirk*, 7 Cal. 419; *Logansport v. Blakemore*, 17 Ind. 318. How shown. *San Antonio v. Lewis*, 9 Texas, 69. In *Indianapolis v. Skeen*, 17 Ind. 628 (1861), it was held that third persons dealing with an agent of the city appointed by the council "to negotiate its bonds at not less than" a specified rate, were not obliged to look to the records of

the council for either his appointment or his instructions, since they were not necessarily of record there; but persons dealing with such an agent are, of course, bound to ascertain the fact of his appointment and the extent of his authority, but not his private instructions. Authority of agent to negotiate sales of bonds. *Cady v. Watertown*, 18 Wis. 322.

<sup>1</sup> *Messenger v. Buffalo*, 21 N. Y. 196 (1860). Where certain work is stipulated to be done under the direction of a street commissioner of a city, this officer has authority, without a vote of the council, to authorize extra work to be done, or materials to be furnished, where these are rendered necessary by the action of the city authorities subsequent to the making of the contract, and where, without such extra work or materials, it would be impossible to fulfil the requirements of the contract. *Ib.* Modification of contracts by unauthorized officers not binding upon the corporation. *Bonesteel v. Mayor, &c. of New York*, 22 N. Y. 162 (1860); *Hague v. Philadelphia*, 48 Pa. St. 527; *O'Hara v. New Orleans*, 30 La. An. pt. 1, 152. As to changes in contracts by parol, see *Hasbrouck v. Milwaukee*, 21 Wis. 217 (1866); compare *Sacramento v. Kirk*, 7 Cal. 419; *infra*, sec. 459. Acceptance by city of proposals to it, see *Springfield v. Harris*, 107 Mass. 532 (1871). Where a city made a contract with a gas company for a year, and continued to observe its terms in subsequent years without renewing it, and then made a new contract for a year, which was likewise observed in later years without being formally renewed, it was held that the city was under an implied obligation to pay for gas for an entire year, when it had accepted gas for a considerable portion of that year. *Taylor v. Lambertville*, 43 N. J. Eq. (16 Stew.) 107.

Defendant's council passed a resolution ordering a public square to be graded, and plaintiff, under an agreement with defend-

where the contract is made by ordinance in the prescribed statutory mode, it can only be repealed or annulled in the same manner.<sup>1</sup>

§ 452 (376). **Contracts made by Agents; Mode of Execution.**—Where officers or agents of a corporation, duly appointed, and acting within the scope of their authority,<sup>2</sup> in executing an instrument in behalf of the corporation *sign their own names and affix their own seals*, such seals are simply nugatory, and the instrument, according to the weight of modern judicial opinion, is to be regarded as the *simple contract of the corporation*, and will bind the corporation and not the individuals executing it, where the purpose to act for the corporation is manifest from the whole paper, and where there are no words evincing an intention to assume a personal liability.<sup>3</sup>

ant's officers, advanced the money for the work, which was done in a satisfactory manner. *Held*, that a subsequent resolution, of which plaintiff had no notice, limiting the expenditure, would not defeat recovery of an amount expended in excess of that limit. *Duncombe v. Fort Dodge*, 38 Iowa, 281 (1874).

<sup>1</sup> *Terre Haute v. Lake*, 43 Ind. 480 (1873); see also *North Pacific L. & M. Co. v. East Portland*, 14 Oreg. 3.

<sup>2</sup> "The general rule is unquestionable that a municipal corporation is not bound by the unauthorized act of an individual, whether an officer of the corporation or a mere private person. But the corporation *may so deal with third persons* as to justify them in assuming the existence of an authority in another which in fact has never been given." *Andrews, J. Davies v. Mayor, &c. of New York*, 93 N. Y. 250. This principle, it is supposed, would not be applicable where the matter so dealt with was under all circumstances *ultra vires* the corporate power. Where a committee was empowered to contract for the erection of a building at a price *not to exceed a specified sum*, it was held they had no power to contract for a larger sum, and that the person contracting with them was bound to take notice of the extent of their power. *Turney v. Town of Bridgeport*, 55 Conn. 412.

<sup>3</sup> *Regents, &c. v. Detroit, &c.*, 12 Mich. 138; *Sweetzer v. Mead*, 5 Mich. 107; *Bank of Metropolis v. Gottschalk*, 14 Pet. 19; *Story Agency*, secs. 154, 260, 276, 277; *Bank of Columbia v. Patterson*, 7

*Cranch*, 299, 307; *Hatch v. Barr*, 1 Ham. (Ohio) 390; *Baker v. Chambliss*, 4 G. Greene (Iowa), 428; *Lyon v. Adamson*, 7 Iowa, 509; 1 Am. Lead. Cas. 602; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 534; *Blanchard v. Blackstone*, 102 Mass. 343; *Stanton v. Camp* (contract signed individually with addition of "committee"), 4 Barb. (N. Y.) 274; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Hopkins v. Mehaffy*, 11 Serg. & Rawle (Pa.), 126; *Angell & Ames*, secs. 293, 295; *Gale v. Kalamazoo*, 23 Mich. 344 (1871); *Burrill v. Boston*, 2 Clifford C. C. 590 (1867). To justify the setting aside of a contract made by an agent of a municipal corporation on the ground of fraud, the fraud must be clearly proved: circumstantial evidence, if relied upon, must be such as is not fairly reconcilable with any other theory than one of fraud by the agent. *Baird v. Mayor, &c. of New York*, 96 N. Y. 567. Where a town clothes its agent, or its committee, with *full power to make a contract*, and it is accordingly made, it is valid and binding, notwithstanding there has been *no formal acceptance* by a vote, or even if it be afterwards rejected by the corporation. *Davenport v. Hallowell*, 10 Me. 317; *Junkins v. School District*, 39 Me. 220 (1855); *Willard v. Newburyport*, 12 Pick. (Mass.) 227; *Kingsbury v. School District*, 12 Met. (Mass.) 99 (1846).

The *selectmen of towns in Massachusetts* have no authority to construct a way and pledge the credit of the town therefor, unless they are authorized by a vote of the

§ 453 (377). **Same subject. Illustrations.** — A few cases will be referred to, *illustrating the rule* just stated. A contract in relation to the survey of a city, a subject exclusively appertaining to the corporation, was entered into "between T. Van V., J. W., C. D. C., a committee appointed by the corporation of the city of Albany for that purpose, of the first part, and John R., Jr., of the second part." The parties of the first part agreed to pay for the work to be done, and signed their individual *names* and affixed their individual *seals* to the agreement. The authority of the committee to act for the corporation and to make the contract being conceded, it was ruled that they were not personally liable, and that it must be enforced by and against the corporation.<sup>1</sup> In another case, a contract for the

town. *Bean v. Hyde Park*, 143 Mass. 245.

Where *school directors* gave an authorized bond for borrowed money, in their individual names, *as* school directors, though signed and sealed in their individual names, the corporation, and not the individuals, are liable thereon. *Heidelberg School Dist. v. Horst*, 62 Pa. St. 301 (1869).

The *power of a committee*, appointed by a vote of a town in *Massachusetts* "to let out and superintend the making" of a highway, is completely executed by the making of a contract with a third person embracing the whole subject-matter of the vote, and by the superintending of the construction of the highway. And therefore, if the person contracted with fails to complete the road according to his contract, this is a matter for the *town* to deal with, and the committee have no power, without new authority from the town, to enter into a contract with another person for its completion. If they do so, and pay money in pursuance thereof, the town is not liable to them therefor. Nor is it liable if they transcend their power, and make a contract for a more expensive road than they were authorized to do. *Keyes v. Westford*, 17 Pick. (Mass.) 273 (1835). *Power of New England towns*, *ante*, secs. 29, 30; *post*, sec. 961.

Power to a *town committee* "to superintend the building of a house for the town," was adjudged to include the power to make the necessary contracts, it not appearing that any other or special committee or agent was appointed for that

purpose, the court being of opinion that the making of contracts was essential to the building of the house. *Damon v. Granby*, 2 Pick. (Mass.) 345 (1824); *ante* chaps. ix., x. *Majority of committee must sign contract*. So held, *Curtis v. Portland*, 59 Me. 483 (1871); *ante*, sec. 283, and note, as to powers of a majority of committee; *post*, sec. 455, note.

It has been held in *Upper Canada*, where work was done under a contract not made with the corporation, or any of its known officers, but merely with persons assuming to act as a duly appointed committee, that no action would lie against the corporation. *Stonesburgh v. The Municipality of Brighton*, 5 Upper Can. Law J. 38. No action can be sustained for a breach of duty against the head of a corporation in not applying the seal to make a contract between a corporation and an individual, founded on a refusal which, if there had been a previous valid contract, would have constituted a breach of it; in other words, there cannot be a remedy against the head of a corporation, equivalent to a remedy on the contract against the corporation, had the contract been duly made so as to create a valid and binding agreement. *Fair v. Moore*, 3 Upper Can. C. P. 484; *Harrison Munic. Manual for Upper Can.* (5th ed.) p. 12.

<sup>1</sup> *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60 (1821); compare, however, *Fullam v. Brookfield*, 9 Allen (Mass.), 1 (1864), where the court denies the doctrine of *Randall v. Van Vechten*; *Bank, &c. v. Patterson*, 7 Cranch, 299, and certain *dicta* in *Damon v. Granby*, 2 Pick. (Mass.) 345.

repair of an engine house of a city was entered into by the inspector of the fire department in his own name, describing himself as "G. N. S., inspector, &c., of the first part," and signed in the same way. It was, in fact, made for and on account of the city, and it was held that the city was liable thereon, although its agent did not use its name in contracting, the court being of opinion, however, that the contract on its face showed it was made for the city.<sup>1</sup>

§ 454 (378). **Same subject. Illustration.**—So, where on a sale of real property by a corporation, a memorandum of the sale was signed by the parties, on which it was stated that the sale was made to A. B., the purchaser, and that he, C. D., "mayor of the corporation, in behalf of himself and the rest of the burgesses and commonalty of the borough of Caermarthen, do mutually agree to perform and fulfil, on each of their parts respectively, the conditions of the sale," and then came the signature of the purchaser, and of "C. D., Mayor," it was held that the agreement *was that of the corporation, and not that of the mayor personally*; and that, consequently, the mayor could not sue thereon.<sup>2</sup>

But the text states the prevailing American rule. See also *Dubois v. Canal Co.* 4 Wend. (N. Y.) 285; *Worrell v. Munn*, 1 Seld. (5 N. Y.) 229; *Ford v. Williams*, 3 Kern. (13 N. Y.) 577, 585; *Richardson v. Scott, &c. Co.*, 22 Cal. 150.

<sup>1</sup> *Robinson v. St. Louis*, 28 Mo. 488 (1859). Where the corporate name of a village was "the president and trustees of the village of G," a contract reciting that it was made by the president and trustees of the "corporation" of G —, *held*, to warrant a finding that the contract was made by the board officially. *Parr v. Greenbush*, 72 N. Y. 463. In 1870 a village board, without advertising for proposals, contracted with P. to lay a sidewalk in May, 1871; the work, however, did not proceed, owing to the failure of the board to furnish the gravel and grading, as required by the contract and P.'s notification. In 1873 the board passed a resolution requiring P. to go on, and if the necessary gravel and grading be not furnished, to furnish the same himself; whereupon he furnished the materials and did the work. In 1871 the village charter was so amended as to require the board to advertise for proposals for grading and paving any sidewalk, and to

award any contract therefor to the lowest bidder. In an action by P. for labor and materials, in pursuance of the resolution, &c.—*Held*, 1. That no abandonment of the contract was established. 2. That the contract was not affected by the subsequent amendment. 3. That the resolution was illegal, and no recovery could be had by P. for the gravel and grading, either upon contract or upon the *quantum meruit*. *Ib.* Where A., B., and C., a committee appointed by a meeting of citizens, make a contract with D., signing the contract as a committee, and affixing their seals thereto, they make themselves personally liable under the contract. The only effect of the word "committee" is like that of "executor" in a personal obligation, to identify the transaction, not to qualify the act. *Ulam v. Boyd*, 87 Pa. St. 477.

<sup>2</sup> *Bowen v. Morris*, 2 Taunt. 374, 387. The case of *Burrill v. Boston*, 2 Clifford C. R. 590 (1867), presents also an instance in which it was considered that a contract signed by the mayor was one intended to be made on behalf of the corporation. But in *Providence v. Miller*, 11 R. I. 272 (1876); s. c. 23 Am. Rep. 453, a contract under seal between certain

§ 455 (379). **Action must be Corporate, not Individual.** — But the action or contract of the officers of a public corporation in their *individual capacity* is not binding upon the corporate body.<sup>1</sup> For example: If the *selectmen of a town* in New England, as *individuals*, request a citizen to furnish supplies to a public enemy, to prevent violence to the town, this gives no legal right of recovery against the town; and as the transaction was wholly beyond the official duty of selectmen, or the duty of the town as a corporation, it was doubted whether a regular vote to pay the plaintiff would have been legal, though it was admitted that a voluntary agreement among the *inhabitants* to this effect would have been binding, being founded on a meritorious consideration, as it was *their* property, and not that of the town, which was in danger.<sup>2</sup>

§ 456 (380). **Specialty Contracts.** — While the agent of a public corporation, who by its vote or authority contracts for its use, cannot bind the corporation by *making a contract by deed*, yet if such agent had authority to make the contract, it is binding upon the corporation as *evidence* of such contract. It follows that a contract of an agent or committee of a town, under his or their own seals, cannot be declared on, *in covenant or debt*, as the deed of the town. The *form of the remedy* against the town<sup>3</sup> is for damages, or in

persons of the first part and one Doyle "in behalf of the city," party of the second part, Doyle being the mayor, and the contract relating to municipal matters, was held upon its face to be the contract of Doyle personally, and not that of the city.

<sup>1</sup> Haliburton v. Frankford, 14 Mass. 214 (1817); Butler v. Charlestown, 7 Gray (Mass.), 12 (1856).

<sup>2</sup> Haliburton v. Frankford, *supra*; Stetson v. Kempton, 13 Mass. 272 (1816); Burrill v. Boston, 2 Clifford C. C. R. 590 (1867); *ante*, sec. 30. A majority of selectmen may, by statute, bind a town in *New Hampshire* by their written contract when acting within the limits of their authority. But a contract signed by one only of the selectmen in his own name, "for the selectmen," does not bind the town, nor will it be rendered valid by proof that another selectman authorized him so to sign the contract, or by proof that such was the practice in the town. If the *corporate name* had been affixed by one, such proof might have been sufficient. Andover v. Grafton, 7 N. H. 298, 305;

Mason v. Bristol, 10 N. H. 36; Hanover v. Eaton, 3 N. H. 38. Powers of towns in *New England*. *Ante*, secs. 29, 30; *supra*, sec. 452, note.

Contracts made by a *majority of the board of aldermen*, without any *official action* of the city council, are not binding upon the city; so decided where counsel were thus employed who rendered legal services beneficial to the corporation. Butler v. Charlestown, 7 Gray (Mass.), 12 (1856); see, also, Sikes v. Hatfield, 13 Gray (Mass.), 347 (1859); see chapter on Corporate Meetings, *ante*. A contract entered into by a board of supervisors, for and on behalf of the county, and signed by the chairman of the board, is the contract of the county. Babcock v. Goodrich, 47 Cal. 488 (1874).

<sup>3</sup> Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 65 (1821); Damon v. Granby 2 Pick. (Mass.), 345 (1824); compare Fullam v. Brookfield, 9 Allen (Mass.), 1; Bank of Columbia v. Patterson's Administrator, 7 Cranch, 299, and rule as stated by Story, J., 306 (1813); Clark v. Cuck-

*assumpsit*. Although in *Damon v. Granby*<sup>1</sup> it was left an open question whether a vote of a town having no corporate seal, expressly authorizing an agent to make a deed of land, or other contract, *under seal*, would, if executed according to the power, become technically the deed of the town, no substantial reason is perceived why such an instrument, thus executed, should not be treated as having all the attributes and qualities of a sealed instrument. If the corporation, however, has a common seal, which is the case with towns in many of the States, and with cities generally, and it is affixed to an instrument in pursuance of the vote of the corporation, or by the proper officer, such an instrument is, beyond doubt, technically *the deed of the corporation*.<sup>2</sup>

§ 457 (381). **Contracts in Excess of Corporate Power; Ultra Vires as a Defence.** — The general principle of law is settled beyond controversy, that the agents, officers, or even city council of a municipal corporation, *cannot bind the corporation* by any contract which is *beyond the scope of its powers*, or entirely *foreign* to the purposes of the corporation, or which (not being legislatively authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators; the officers are but the public agents of the corporation.<sup>3</sup> The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger and accompanied with such abuse that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of

field Union, 11 Eng. Law and Eq. 442; *Pennington v. Taniere*, 12 Queen's B. 1011. *Covenant* cannot be maintained against a city on a contract with the water commissioners of the city, although the statute declares that their contracts should be binding upon and be considered as done by the mayor and council. *Keeney v. Hudson*, 3 Dutch. (N. J.) 362; *ante*, sec. 192; *Providence v. Miller*, 11 R. I. 272; s. c. 23 Am. Rep. 453.

<sup>1</sup> *Damon v. Granby*, 2 Pick. (Mass.) 345, 352. (1824).

<sup>2</sup> *Ib.*; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 65 (1821). But see

*Fullam v. Brookfield*, 9 Allen (Mass.), 1. *Corporate seal. Ante*, secs. 190, 192; *Neely v. Yorkville*, 10 S. C. 141, approving text. An agreement in writing by an attorney to refer a certain cause acted on by the court was held to bind his client. *Brooks v. New Durham*, 55 N. H. 559 (1875).

<sup>3</sup> *Halbut v. Forrest City*, 34 Ark. 246; *Oubre v. Donaldsonville*, 33 La. An. 386; *Pugh v. Little Rock*, 35 Ark. 75 (approving text), where an ordinance authorizing the issue of certificates of indebtedness at a discount was held not admissible as evidence against the city.



the chartered authority of the corporation.<sup>1</sup> The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard.<sup>2</sup> It results from this doctrine that contracts not authorized by the charter or by other legislative act, that is, not within the scope of the powers of the corporation under any circumstances, are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defence its own want of power under its charter or constituent statute to enter into the contract.<sup>3</sup> In favor

<sup>1</sup> Text approved. *City of Eufala v. McNab*, 67 Ala. 588; *Fort Wayne v. Lehr*, 88 Ind. 62; *Pine Civil Township v. Huber Manuf. Co.*, 83 Ind. 121; *Cowdrey v. Caneadea*, 16 Fed. Rep. 532.

<sup>2</sup> This subject is touched upon in the concluding portion of chap. i., *ante*. Principle of construction of corporate powers. *Ante*, secs. 89-92. See also *ante*, sec. 447. *Lyddy v. Long Island City*, 104 N. Y. 218 (contractor chargeable with notice of limitations upon agent's authority); *Appeal of Whelen*, 108 Pa. St. 162.

<sup>3</sup> *Post*, chap. xxiii., sec. 935, where the subject of *ultra vires* is further considered; and see also the following cases: *Cheaney v. Brookfield*, 60 Mo. 53 (1875), citing text; *Marsh v. Fulton County*, 10 Wall. 676 (1870); *Thomas v. Richmond*, 12 Wall. 349 (1870); *Bridgeport v. Housatonic Railroad Co.*, 15 Conn. 475, 493 (1843); *Burrill v. Boston*, 2 Clifford C. C. 590 (1867); *Martin v. Brooklyn*, 1 Hill, 545; *Norwich Overseers, &c. v. New Berlin, &c.*, 18 Johns. 382; *Donovan v. New York*, 33 N. Y. 291; *Seibrecht v. New Orleans*, 12 La. An. 496 (1857); *Clark v. Des Moines*, 19 Iowa, 199, 209 (1865); *Loker v. Brookline*, 13 Pick. (Mass.) 343, 348; *Philadelphia v. Flanigen*, 47 Pa. St. 21; *Paris Tp. Tr. v. Cherry*, 8 O. St. 564; *Hague v. Philadelphia*, 48 Pa. St. 527; *Albany v. Cunliff*, 2 Comst. (2 N. Y.) 165 (1849), reversing s. c. 2 Barb. 190; *Cuyler v. Rochester*, 12 Wend. (N. Y.) 165 (1834); *Hodges v. Buffalo*, 2 Denio (N. Y.) 110 (1846); *Halstead v. New York*, 3 N. Y. 430 (1850); *Martin v. Mayor*, 1 Hill (N. Y.), 545; *Boom v. Utica*, 2 Barb. (N. Y.) 104; *Cornell v. Guilford*, 1 Denio (N. Y.), 510; *Boylard v. Mayor, &c.*, of New York, 1 Sandf. (N. Y.) 27 (1847); *Dill v. Ware-*

*ham*, 7 Met. (Mass.) 438 (1844); *Vincent v. Nantucket*, 12 Cush. (Mass.) 103, 105 (1858), *per Merrick, J.*; *Stetson v. Kempton*, 13 Mass. 272; *Parsons v. Inhabitants of Goshen*, 11 Pick. (Mass.) 396; *Wood v. Lynn*, 1 Allen (Mass.), 108 (1861); *Spalding v. Lowell*, 23 Pick. (Mass.) 71; *Mitchell v. Rockland*, 45 Me. 496 (1858); s. c. 41 Me. 363; *Western College v. Cleveland*, 12 Ohio, 375; *Tippicanoe Co. Comm'rs v. Cox*, 6 Ind. 403 (1855); *Inhabitants v. Weir*, 9 Ind. 224 (1857); *Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104 (1858); *Brady v. New York*, 20 N. Y. 312; *Appleby v. New York*, 15 How. Pr. (N. Y.) 428; *Estep v. Keokuk County*, 18 Iowa, 199, and cases cited by *Cole, J.*; *Clark v. Polk County*, 19 Iowa, 248 (1865); *supra*, sec. 447; *post*, sec. 935; *Perry v. Superior City*, 23 Wis. 64 (1870); *McDonald v. New York*, 68 N. Y. 23 (1876); s. c. 23 Am. Rep. 144; *Maupin v. Franklin Co.*, 67 Mo. 327; *Driftwood Val. Turnp. Co. v. Bartholomew County Comm'rs*, 72 Ind. 226; *New Jersey & N. E. Tel. Co. v. Fire Comm'rs*, 34 N. J. Eq. 117; *Laycock v. Baton Rouge*, 35 La. An. 475; *Lincoln v. Stockton*, 75 Me. 141; *Earley's Appeal*, 103 Pa. St. 273, where the purchase from a third party of a judgment against a creditor of a city for the purpose of setting it off against his claim was held *ultra vires* and void. *Salt Lake City v. Hollister*, 118 U. S. 256, affirming s. c. 3 Utah, 200; but, in this case the city, having engaged in the business of distilling liquors without power so to do, was held liable for the United States taxes thereon. In *Illinois* it is held that, where a municipal corporation enters into a contract which, although not expressly authorized by its charter, is not in violation of the charter or of any stat-

of *bona fide* holders of negotiable securities, the corporation may be estopped to avail itself of irregularities in the exercise of power conferred; but it may always show that under no circumstances had the corporation *power* to make a contract of the character in question. This subject has been already referred to, and will be considered in a subsequent portion of the present chapter.<sup>1</sup> The mere fact, however, that a city, in making a contract for a public improvement within its corporate powers, promises to make payment in negotiable bonds, which it has no power to issue, does not

ute, and has thereby induced the other party to it to expend money in the performance of his part of it, the municipal corporation may be held liable. *East St. Louis v. East St. Louis Gas L. & C. Co.*, 98 Ill. 415. *Supra*, sec. 444. Corporation may defend against unauthorized contract, although its *seal* is attached to it. *Leavenworth v. Rankin*, 2 Kan. 358 (1864); *ante*, sec. 192.

Mr. Justice *Coulter*, in delivering the opinion in *Alleghany City v. McClurkin*, 14 Pa. St. 81, expresses the opinion that a municipal corporation may be liable for the contracts *ultra vires* of its officers, when these are publicly entered into with the knowledge of the people, and not objected to until after the rights of third persons have attached. Such a principle is believed to be both unsafe and unsound; the only true and safe view being that all persons are bound to take notice of the powers and authority which the law confers upon the officers of such corporations. See *Loker v. Brookline*, 13 Pick. (Mass.) 343. Any liability in such cases must, according to the present weight of authority, be independent of the contract, and cannot be asserted in an action based upon the contract to enforce its executory provisions. *Supra*, sec. 444. Auditing and paying part of a claim presented, accompanied with a denial of liability for the residue, does not estop the corporation from contesting the residue, even though it be upon grounds which show the former allowance to have been improper. *People v. N. Y. Sup.*, 1 Hill (N. Y.), 362 (1841). In an action on a contract for doing work which a municipal corporation had the power to make, it is no defence that the city ought to have adopted some less expensive means

of accomplishing the purpose in view. *Livingston v. Pippin*, 31 Ala. 542 (1858).

The case of *The State v. Buffalo*, 2 Hill (N. Y.) 434, determines an interesting point. Arms belonging to the State were loaned to the city authorities to suppress disorderly assemblages. The keeper of the arsenal had no right to make the loan, but it was made in good faith, and the bond of the city taken for their return on demand. The city being sued on this bond made the point that it was void for illegality; but the court regarded it rather as a *bona fide* excess of authority simply, and held that though the loan was unauthorized the State might waive the tort committed on the property and seek a remedy upon the bond. See *infra*, sec. 458, and note.

The power of State building commissioners to discharge at their discretion the building superintendent whom they employ is vested in them for the public benefit, and they cannot be divested of that power by any contract entered into by them with the person so employed, where such contract is not *ratified* by the legislature. If the legislature, with full knowledge of the contract entered into by the commissioners with the plaintiff, and of all the facts relating thereto, recognizes and acts upon it, making appropriations to complete the building in question upon its assumed validity, that will constitute a *ratification* of the contract; but such ratification can be shown only by some action of both houses by statute or resolution. *Shipman v. The State*, 43 Wis. 381 (1877).

<sup>1</sup> *Ante*, sec. 163; *infra*, secs. 511-553; *Moore v. New York*, 73 N. Y. 238, approving text.

make the entire contract *ultra vires*; and therefore if work be done under such contract the city will be liable therefor.<sup>1</sup>

<sup>1</sup> *Hitchcock v. Galveston*, 96 U. S. 341 (1877). In this case the city made a contract with the plaintiffs to pave streets. It had the power to make a valid contract for this purpose: but the city having in the contract agreed to make payment for the work in negotiable city bonds payable at a future day, it was objected that, since no express power was given to issue bonds for this purpose, the whole contract was therefore inoperative and void; and the lower court so decided, and its ruling was supposed to be supported by the cases of *Tenzas Parish Police Jury v. Britton*, 15 Wall. 570, and *Memphis v. Ray*, 19 Wall. 468. [See *ante*, secs. 117-126.] But the Supreme Court held otherwise, and in giving its judgment on this point, Mr. Justice *Strong* observed: "In the view which we shall take of the present case, it is perhaps not necessary to inquire whether those cases justify the court's conclusion; for if it were conceded that the city had no lawful authority to issue the bonds described in the ordinance and mentioned in the contract, it does not follow that the contract was wholly illegal and void, or that the plaintiffs have no rights under it. They are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful. There may

be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized; at most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only *ultra vires*; and in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform. This was directly ruled in *The State Board of Agriculture v. The Citizens' Street Railway Co.*, 47 Ind. 407. There it was held that 'although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money, and perform his part thereof, the corporation is liable on the contract.' See, also, substantially to the same effect, *Alleghany City v. McClurkin*, 14 Pa. St. 81; and, more or less in point, *Maier v. Chicago*, 38 Ill. 266; *Oneida Bank v. Ontario Bank*, 21 N. Y. 495; *Argenti v. San Francisco*, 16 Cal. 256; *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Ch. 373." But *quære* as to the liability in such case being on the contract. See *ante*, secs. 89-91, 444; *post*, sec. 459, note. A charter provision that after a pavement has been laid at the expense of the abutter, "the city shall take charge of and keep the same in repair, without further assessment," is not a contract exempting the owners from future assessments. *State v. Newark*, 8 Vroom,

§ 458 (382). **Contracts ultra vires or invalid.**—Agreeably to the foregoing principles, a corporation cannot maintain an *action on a bond or a contract which is invalid*, as where a city, without authority, loaned its bonds to a private company, and took from it a penal bond, conditioned for the faithful application of the city bonds to payment for works which the city had no power to construct or assist in constructing.<sup>1</sup> The remedy in such case must be in some other form than in an action to enforce the contract. So, a contract by a city to waive its right to go on with the laying out of a street or not, as it might choose, is, it seems, against *public policy*, and it is void if it amounts to a surrender of its legislative discretion.<sup>2</sup> So, a promise to pay a public corporation, or its agents, a premium *for doing their duty is illegal and void*; and a contract will not be sustained which tends to restrain or control the unbiased judgment of public officers. But a *promise by individuals to pay a portion of the expenses of public improvements* does not necessarily fall within this principle, and such a promise is not void as being against public policy; and if the promisors have a peculiar and local interest in the improvement, their promise is not void for want of consideration, and may be enforced against them.<sup>3</sup> So, on the other hand, a party

415 (37 N. J. L.), reversing s. c. 6 Vroom, 168.

<sup>1</sup> City Council v. Plank Road Co., 31 Ala. 76 (1857). See *Wetumpka v. Winter*, 29 Ala. 651; *Halstead v. New York*, 3 N. Y. 430; s. c. 5 Barb. 218; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475, 493. But see *State v. Buffalo*, 2 Hill (N. Y.), 434, cited *supra* in note to sec. 457. Where a city having, without proper authority, guaranteed the payment of railroad bonds which were secured by a trust deed, and become the owner of the bonds from having paid them at maturity, it was held that, while the city might have successfully contested its liability on the bonds, yet the want of authority to guarantee the bonds did not affect the lien created by the deed in its favor as against other creditors of the railroad company. *Hay v. Alexandria & W. R. Co.*, 20 Fed. Rep. 15. *Infra*, sec. 471, as to suretyship.

<sup>2</sup> *Martin v. Mayor, &c.*, 1 Hill (N. Y.), 545 (1841); *ante*, sec. 97. As to *public policy*, see *Ohio Life Ins. & T. Co. v. Merchants Ins. & T. Co.*, 11 Humph. (Tenn.) 1; *ante*, chap. xii.; *Indianapolis v. Indianapolis Gas L. & C. Co.*, 66 Ind. 396, citing text.

*Corrupt agreements with aldermen*, to influence them to a particular course in the discharge of official duties, are, of course, void, no matter to whom executed. *Cook v. Shipman*, 24 Ill. 614.

Contracts with *municipal officers*. *Ante*, secs. 283, 292, 444.

<sup>3</sup> *Townsend v. Hoyle*, 20 Conn. 1 (1849). This case holds that a promise by the defendants to pay the city the expense of laying a certain street was binding; and *Ellsworth, J.*, in delivering the opinion, said: "We cannot assent to the proposition that a promise by individuals to pay a part of the expenses of public improvements, ordered by public authority, is, of course, illegal and void. The amount or cost may properly enough enter into the question of expediency or necessity. If made in one way or in one place, it will be much better for the public, though more expensive; but individuals specially benefited stand ready, by giving their land, their money, or their labor, to meet the extra expense. Will these promises be void, as being without consideration or against public policy? We think not." See chapter on Streets, *post*; *Springfield v. Harris*, 107 Mass. 532. An arrange-

making with a city a contract which is *ultra vires* is not estopped, when sued thereon by the corporation for damages, to set up its want of authority to make it.<sup>1</sup>

§ 459 (383). **Implied Contracts.**—The present state of the authorities clearly justifies the opinion of Chancellor Kent, that corporations may be bound by *implied contracts* within the scope of their powers, to be deduced by inference from authorized corporate acts, without either a vote, or deed, or writing.<sup>2</sup> This doc-

ument or combination among the parties applying, whereby a few individuals, desirous of causing paving and grading to be done, *procured the signatures of others to the application by paying them a consideration therefor*, directly or indirectly, is a fraud in law and contrary to public policy. *Howard v. The Church*, 18 Md. 451. If executory, such an agreement cannot be enforced. *Maguire v. Smock*, 42 Ind. 1 (1873); s. c. 13 Am. Rep. 353. A written promise to pay into the county treasury a certain sum of money, upon the condition that the county commissioners, who had removed the county court-house from the public square, and were building a new court-house elsewhere, would remove it back to said square, which offer was accepted by said commissioners, who entered on their records an order for such relocation, was not void as against public policy, though the commissioners were not expressly authorized by statute to receive such donations. *Stilson v. Lawrence Co.*, 52 Ind. 213 (1876); *State v. Johnson's Admr.*, 52 Ind. 197 (1876); *post*, sec. 596.

<sup>1</sup> *Montgomery City Council v. Montgomery & W. Pl. R. Co.*, 31 Ala. 76 (1857); *Penn., Del. & Md. Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 319, 320; *Hodges v. Buffalo*, 2 Denio (N. Y.), 110. If a corporation has received money in advance on a contract void on account of want of authority to make it, and afterwards refuses to fulfil the contract, the party advancing the money may, without demand, recover it back in an action for money had and received. *Dill v. Wareham*, 1 Met. (Mass.) 438 (1844). In this case the corporate defendant undertook, without authority, to transfer to the plaintiff the right of taking oysters within its

limits; contract held wholly void. See also, *McCracken v. San Francisco*, 16 Cal. 591; *infra*, secs. 459, 460; compare *Herzo v. San Francisco*, 33 Cal. 134. That the contract of agents within the scope of corporate power may be ratified, or a contract implied from the enjoyment of the benefit of the consideration. *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453 (1858), opinion of *Field, J.*; *Backman v. Charlestown*, 42 N. H. 125; see *Bissell v. Railroad Co.*, 22 N. Y. 258; *post*, secs. 935–938.

<sup>2</sup> 2 Kent Com. 291; *Bank of Columbia v. Patterson*, 7 Cranch, 299 (1813) (a leading American case); *Mott v. Hicks*, 1 Cow. (N. Y.) 513; *Dunn v. Rector, &c.*, 14 Johns. (N. Y.) 118; *Bank of U. S. v. Dandridge*, 12 Wheat. 74; *Perkins v. Wash. Ins. Co.*, 4 Cow. (N. Y.) 645; *Davenport v. Peoria Insurance Co.*, 17 Iowa, 276, and cases cited by *Cole, J.*; *American Insurance Co. v. Oakley*, 9 Paige (N. Y.), 496; *Magill v. Kauffman*, 4 Serg. & Rawle (Pa.), 317; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; *Wayne County v. Detroit*, 17 Mich. 390; *Lesley v. White*, 1 Speers (S. C.) Law, 31; *Canaan v. Derush*, 47 N. H. 212; *Lebanon v. Heath*, *Id.* 353; *Adams v. Farnsworth*, 15 Gray (Mass.), 423; *Shrewsbury v. Brown*, 25 Vt. 197; *Gassett v. Andover*, *Id.* 342; *Peterson v. Mayor, &c.*, of New York, 17 N. Y. 449, 453 (1858); *Danforth v. Schoharie Turnpike Co.*, 12 Johns. (N. Y.) 227; *Angell & Ames*, sec. 237; *Maher v. Chicago*, 38 Ill. 266; *Frankfort Bridge Co. v. Frankfort*, 18 B. Mon. (Ky.) 41; *Bryan v. Page*, 51 Tex. 532; *State Board v. Aberdeen*, 56 Miss. 518, approving text; *Taylor v. Lambertville*, 43 N. J. Eq. (16 Stew.) 107 (for brief statement of facts of this case, see sec. 451, note); *supra*, sec. 450; *Broom*,

trine is applicable equally to public and private corporations, but in applying it, however, care must be taken not to violate other principles of law.<sup>1</sup> Thus it is obvious that an implied promise cannot be raised against a corporation, where by its charter it can only contract in a prescribed way, except it be a promise for money received or property appropriated under the contract.<sup>2</sup> So, where the corporation orders local street improvements to be made, for which the abutters

Commentaries on Com. Law, 561-570, where the English cases are collected. The reader will be interested in the letter of Mr. Justice Story to Mr. Justice Coleridge on the subject of corporate liability for the parol contracts, *intra vires*, of the authorized agents of the corporation. 2 Story's Life and Letters, 335, 337. He there adds, what is now settled law, "that all duties imposed upon a corporation by law, and all services performed at its request, raise implied promises binding on the corporation, if, of course, no statute be thereby infringed." *Id.*

<sup>1</sup> Peterson v. Mayor, &c. of New York, 17 N. Y. 449, 453; Poultney v. Wells, 1 Aiken (Vt.), 180. Where a city contracted with a railroad company to do certain work, and the company employed persons to do it, there is no implied contract on the part of the city to pay them, although the city saw them at work. Alton v. Mulledy, 21 Ill. 76 (1859). When contracts can only be proved by the record; and when there is no implication as to contracts; and when they must appear by the records of the corporate proceedings. See Crump v. Colfax Co. Supervisors, 52 Miss. 107; Huntington County Comm'rs v. Boyle, 9 Ind. 296; Warwick v. Butterworth, 17 Ind. 129; St. Louis v. Cleland, 4 Mo. 84; Alton v. Mulledy, 21 Ill. 76 (1859); San Antonio v. Gould, 34 Tex. 76; People v. Fulton Co., 14 Barb. (N. Y.) 56; Bryan v. Page, 51 Tex. 532; Gilbert v. New Haven, 40 Conn. 102 (1873).

*Must be an authorized request.* "No person can make himself a creditor of another by voluntarily discharging a duty which belongs to that other." Strong, J., in Salsbury v. Philadelphia, 44 Pa. St. 303; Baltimore v. Poultney, 25 Md. 18; Jeffersonville v. Ferry Boat, 35 Ind. 19 (1870). In Seibrecht v. New Orleans, 12 La.

An. 496, (1857), carpets were furnished for certain corporation courts, by order of the clerks or judges, but without any authority of the common council, and were worn out before the plaintiff presented his bill. It was contended that the city was liable *ex æquo et bono*, having used, and not returned the carpets; but it did not appear that the council knew that they had been purchased for the city, and were being used in its buildings. The court denied the liability, saying that "the only safe rule is to hold that the city cannot be bound for any contract made without its authorization, expressed by a resolution of the common council." That an unauthorized contract, however advantageous, does not bind the corporation, see Loker v. Brookline, 13 Pick. (Mass.) 343; Jones v. Lancaster, 4 Pick. (Mass.) 149; Wood v. Waterville, 5 Mass. 294.

A contract was implied on the part of a city, which was bound to support its paupers, and which had refused to pay a person who had furnished a pauper with necessaries. Seagraves v. Alton, 13 Ill. 371. Here it will be noticed that there was an express refusal on the part of the city to support the pauper, and yet a promise was *implied*. This implication is a pure fiction to support what the court regarded as a just claim. A contract made by one member of a committee or county board for services which are authorized to be obtained is not obligatory on the municipality. The power is vested in the whole body, and no one member can bind the corporation. Bentley v. Chicago Co. Comm'rs, 25 Minn. 259.

<sup>2</sup> McSpedon v. Mayor of New York, 7 Bosw. (N. Y.) 601; McCracken v. San Francisco, 16 Cal. 591; Pimental v. San Francisco, 21 Cal. 351; Dickinson v. Poughkeepsie, 75 N. Y. 65; Richardson v. County of Grant, 27 Fed. Rep. 495.

are the parties ultimately liable, and which by the charter must be made in a prescribed mode, if made without any contract or a valid one, the doctrine of implied liability does not apply in favor of the contractor, unless, indeed, the corporation has collected the amount from the adjoining owners and has it in its treasury.<sup>1</sup>

<sup>1</sup> *Argenti v. San Francisco*, 16 Cal. 255, opinion of Field, C. J. A municipal corporation was holden liable, under its charter, upon an implied assumpsit to collect and pay over assessments awarded to property owners for the opening of a street. *Wheeler v. Chicago*, 24 Ill. 105 (1860); see *infra*, secs. 466, 480, 483; *Sangamon Co. v. Springfield*, 63 Ill. 66 (1872). Where a contractor has entered into a contract in good faith, relying upon the regularity of the proceedings of the common council, the city, having received the benefit of the performance, is estopped from questioning the regularity in that regard. *Moore v. New York*, 73 N. Y. 238. Where certificates of assessments against property owned by the State for a sewer tax, were declared void for want of power in the city to make the assessment, it was held that the city was liable to the contractor for the amount thereof. *Polk County Savings Bank v. State*, 69 Iowa, 24. So also where assessments are void for other reasons, the municipality has been held liable. *Scofield v. Council Bluffs*, 68 Iowa, 695. Compare *Bucroft v. Council Bluffs*, 63 Iowa, 646. *Post*, sec. 480. But where a contractor for the improvement of streets agreed that he would not look to the town in any event for compensation, and it was afterwards decided that the contract was *ultra vires* and void, and that the lot-owners were not liable for the work, it was held that the town was not liable to him, by reason of its *inherent power* to improve streets. *Belleview v. Hohn*, 82 Ky. 1. *Post*, secs. 467, 480. So where the charter of a city declared that it should *not be liable in any manner for local improvements* which are made a charge upon the adjacent property; and the council by a resolution which was a nullity, because of the non-concurrence of the mayor, ordered a certain local improvement to be made, and the work let to the plaintiff, who did it, and failed to collect the same (by reason of the nullity

of the resolution) from the adjoining owners (*Saxton v. Beach*, 50 Mo. 488, 1872); and having expended a considerable sum in an unsuccessful attempt to charge the abutting property, he brought suit against the city to recover the sum so expended in testing the validity of the resolution of the council. The Supreme Court of *Missouri* held that the city was not liable, distinguishing *Clayburgh v. Chicago*, 25 Ill. 535, and *Fisher v. St. Louis*, 44 Mo. 482; *Saxton v. St. Joseph*, 60 Mo. 153 (1875). In *Kentucky* it is held there is no liability unless the city has the right to proceed to make property-holders liable. But if the nature or ownership of the adjacent property is such that no steps which could have been taken would have rendered it or its owner liable, then the city must pay for the improvement, or it will have as to such work no means of executing its general power to improve all streets. *Caldwell v. Rupert*, 10 Bush (Ky.), 179; *Louisville v. Nevin*, 10 Bush (Ky.), 549; *Craycraft v. Selvage*, 10 Bush (Ky.), 696 (1874).

Where a city, organized and acting under a general law, which provides: "The city shall be *liable to the contractors for so much thereof only* as is occupied by public grounds of the city bordering thereon, and the crossings of streets and alleys," makes a contract for the improvement of a street at the expense of the property holders, and the contractor does the work in whole or in part, and the engineer refuses to make an estimate, and the council refuses to issue precepts upon the proper application against the property holders, a suit cannot be maintained by the contractor against the city for damages. The remedy in such case is by mandate to compel the engineer and council to perform their duties. *Greencastle v. Allen*, 43 Ind. 347 (1873). If the members of the common council of a city, in passing an ordinance and letting a contract for the improvement of a street, act in good

§ 460 (384). **Same subject.** — “The doctrine of *implied municipal liability*,” says Mr. Chief Justice Field, in a case where the subject underwent very thorough examination, “applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it,—not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial.<sup>1</sup> If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation: the law, which always intends justice, implies a promise. In reference to *money or other property*, it is not difficult to determine in any particular case whether a liability with respect to the same has attached to the city. The money must have gone into her treasury, or been appropriated by her;<sup>2</sup> and when it is property other than money, it must have been used by her, or be under her control. But with reference to *services rendered*, the case is different. Their acceptance must be evidenced by ordinance [or express corporate action] to that effect. If not originally authorized, no liability can attach upon any ground of implied contract. The acceptance, upon which alone the obligation to pay could arise, would be wanting.”

faith, under a misapprehension, they and the contractor, as well as the adjacent owner of real estate, believing the street to be within the corporate limits of the city, the contractor having like knowledge with the members of the council, they cannot be held liable for the cost of such improvement, though the place where the same is made is not within the corporate limits. *Newman v. Sylvester*, 42 Ind. 106 (1873).

It is the general doctrine that corporations possess the powers expressly conferred by law, and such implied powers as are necessary to enable them to exercise the powers expressly granted, and no others; yet, although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the charter of the corporation or any statute prohibiting it, and the corporation by its promise induced a party,

relying upon such promise and in execution of the contract, to expend money and perform his part of the contract, the corporation is liable on the contract. *The State Board of Agriculture v. The Citizens' Street Railway Co.*, 47 Ind. 407 (1874). See on this point and as to this case *supra*, sec. 457, note.

<sup>1</sup> See *Dowell v. Portland*, 13 Oreg. 248.

<sup>2</sup> The power of the *Massachusetts towns* to appropriate money is derived wholly from the statutes (*ante*, sec. 30), and when they are confined to a particular mode of creating a debt, the mode is a limitation of the power. One, therefore, who loans money to a town treasurer in a manner not authorized by statute has no right of action against the town to recover it, although the money was used in paying the debts of the town. *Agawam Nat'l Bank v. South Hadley*, 128 Mass. 503.



§ 461. **Same subject.** — “As a *general rule*, undoubtedly, a city corporation is *only liable upon express contracts*, authorized by ordinance [or other due corporate proceedings]. The *exceptions relate to liabilities* from the use of money or other property which does not belong to her, or to liabilities springing from the neglect of duties imposed by the charter, from which injuries to parties are produced. There are limitations even to these exceptions in many instances, as where property or money is received in disregard of positive prohibitions; as, for example, the city would not be liable for moneys received upon the issuance of bills of credit, — as this would be, in effect, to support a proceeding in direct contravention of the inhibition of the charter.”<sup>1</sup> But it may in a proper case make a new contract purging a former contract of its illegality.<sup>2</sup> Nor is a city liable for money received for notes issued by it to circulate as money, in violation of an express statute and the public policy of the State.<sup>3</sup>

<sup>1</sup> *Per Field, C. J.*, in *Argenti v. San Francisco*, 16 Cal. 255, 282 (1860). Where statute provisions enacted to prevent the making of certain contracts are disregarded and a contract made without observing them, the contractor cannot recover the value of articles supplied under the contract upon an implied liability; in such a case no liability can be implied. *McDonald v. New York*, 68 N. Y. 23; s. c. 23 Am. Rep. 144, commenting on *Nelson v. New York*, 63 N. Y. 535; and *Argenti v. San Francisco*, *supra*.

“The law,” says an eminent judge, “never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Assumpsit may be maintained against a municipal corporation in certain cases upon an implied promise, but the better opinion is that a promise to pay can never be implied in a case where the corporation possesses no power to contract.” *Per Clifford, J.*, in *Burrill v. Boston*, 2 Clifford C. C. 590, 596 (1867). The subject is further expounded by the same learned justice in his opinion in *The Collector v. Hubbard*, 12 Wall. 1, 12 (1870). See, also, *Curtis v. Fiedler*, 2 Black (U. S.), 478; *Murphy v. Louisville*, 9 Bush (Ky.), 189 (1872).

*See on subject of implied liability*, the judgment of the United States Supreme

Court in *City of Louisiana v. Wood*, 102 U. S. 294; see secs. 459 and 938, where the subject is further considered; and see *Litchfield v. Ballou*, 114 U. S. 190. *Morawetz on Corp.* (2d ed.) secs. 689-706, 714-724, collects and reviews the authorities as to the rights and obligations arising out of the performance or part performance of contracts in excess of corporate power.

<sup>2</sup> *Little Rock v. Merch. Nat. Bank*, 98 U. S. 308, quoted *supra*, sec. 448, note.

<sup>3</sup> *Thomas v. Richmond*, 12 Wall. 349 (1870). The principles upon which the decision rests are admirably stated in the opinion of Mr. Justice *Bradley*. *Cheeny v. Brookfield*, 60 Mo. 53 (1875), citing text; *State Board v. Aberdeen*, 56 Miss. 518 (approving text); *Brown v. Belleville*, 30 Upper Can. Q. B. 373; *Wentworth v. Hamilton*, 34 Upper Can. Q. B. 585; *Brown v. Lindsey*, 35 Upper Can. Q. B. 509; *Parsons v. Monmouth*, 70 Me. 262 (1879), approving text. *Supra*, sec. 448; *post*, sec. 938.

In *Cheeny v. Brookfield*, 60 Mo. 53 (1875), it was held that a municipal corporation is not liable upon a warrant issued to a bank-note company in payment of a debt to the company for engraving and printing on bank-note paper notes payable to bearer, to be put into circulation by the corporation as money without authority of law. The court held that there could be no implied assumpsit in such a

§ 462. **Contracts; Ultra Vires; Assumpsit.**—Where a city, without authority of law, issued its bonds in exchange for the bonds of a railroad company, which remain wholly unpaid, the city is not liable on its bonds. If in such case value has been received by the city, the remedy, if any exists under the special circumstances, must be for the money or property received without consideration.<sup>1</sup>

case, and distinguished it from *Allegheny City v. McClurkan*, 14 Pa. St. 81, and denied *Underwood v. Newport Lyceum*, 5 B. Mon. (Ky.) 130.

*Illustrations of implied liability.*—City is liable for gas furnished to it with knowledge of the council, though no ordinance or resolution was passed authorizing it to be furnished. *Gas Co. v. San Francisco*, 9 Cal. 453, 466 (1858), opinion of *Field, J.* If a city sells its *void* bonds, there is an implied assumpsit to repay the purchase-money. *Paul v. Kenosha*, 22 Wis. 266 (1867). See and compare *Litchfield v. Ballou*, 114 U. S. 190. Assumpsit held to lie against a city which had availed itself of the property and services of an individual in the care of the indigent sick. *Nashville v. Toney*, 10 Lea, 648. Where a bridge corporation was requested by the city authorities to communicate to them the terms upon which the city might attach its water-pipes to the bridge, to carry the water from one side of the river to the other, which the bridge company answered, fixing a sum, upon which the city council took no action, but proceeded to extend the water-works and used the bridge, the court held the city was liable. *Bridge Co. v. Frankfort*, 18 B. Mon. (Ky.) 41 (1857). *Broom Commentaries on Com. Law*, 567, where the English cases are cited in which corporations have been held *liable by reason of enjoying the benefits* resulting from particular contracts. See *McDonald v. New York*, 68 N. Y. 23 (1876); s. c. 23 Am. Rep. 144, *Folger, J.*, suggests instances of implied liability; *post*, secs. 938, 939.

Chief Justice Harrison, in his excellent "Municipal Manual for Upper Canada," has digested the decisions in the Province on the subject of the power of corporations to contract. He says (5th ed. p. 11), "It is a principle applicable to all corporations that they must contract under seal. To this principle there are some exceptions.

*Albert Cheese Co. v. Leeming*, 31 U. C. C. P. 272. One of some moment has been created with regard to municipal corporations. It is that such a corporation is liable to be sued in an action of debt on simple contract for the price of goods furnished, or labor done at their request and accepted by them. *Fetterly v. The Municipality of Russell and Cambridge*, 14 Upper Can. Q. B. 433. Though in such a case there be no contract under seal, the law implies an undertaking by a corporation to pay for labor and materials employed in their service, and of which they have accepted and are enjoying the benefit, provided the purpose for which the labor and materials have been applied is one clearly within the legitimate object of their charter. *Bartlett v. The Municipality of Amherstburg*, 14 Upper Can. Q. B. 152; *Fetterly v. The Municipality of Russell and Cambridge*, 14 Upper Can. Q. B. 433; *Pim v. The Municipal Council of Ontario*, 9 Upper Can. C. P. 302; *Perry v. The Corporation of Ottawa*, 23 Upper Can. Q. B. 391; *Brown v. Belleville*, 30 Upper Can. Q. B. 373; *Wentworth v. Hamilton*, 34 Upper Can. Q. B. 585; *Brown v. Lindsay*, 35 *Ib.* 509. The exception, however, does not extend to executory contracts, such as work, &c., to be done, but is confined to work in fact done and accepted. *McLean v. The Town Council of the Town of Brantford*, 16 Upper Can. Q. B. 347; *Wingate v. The Ennis-killen Oil Refining Co.*, 14 Upper Can. C. P. 379; *Mayor, &c. v. Hardwick*, L. R. 9 Exch. 13; *Austin v. Guardians, &c.*, L. R. 9 C. P. 91; *Houck v. Whitty*, 14 Grant, 671."

<sup>1</sup> *Thomas v. Port Hudson*, 27 Mich. 320 (1873). In this case *Cooley, J.*, observes: "A municipal corporation has no general authority to exchange promises with other corporations or persons; its contracts, to be valid, must be within the scope of the authority conferred upon it

§ 463 (385). **Ratification of Unauthorized Contract.** — A municipal corporation *may ratify* the unauthorized acts and contracts of its agents or officers, which are *within the scope of the corporate powers, but not otherwise*. Ratification may frequently be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals.<sup>1</sup> But a subsequent ratification cannot

by law, and for municipal purposes. And if, under pretence of law, its officers in its name obtain money, property, or rights in action which equitably belong to another, the fact may entitle the party to the proper remedy, but it cannot make good bonds issued in violation of law, unless it is to be held [which is not the law] that the power of municipal corporations to make legal promises is co-extensive with that of individuals, and that any contracts they may make are valid where it can be said that anything of value was given or inconvenience submitted to in exchange."

If the consideration received under an *ultra vires* contract can be restored, equity will not relieve a municipal corporation from the contract without providing for its restoration. *Turner v. Cruzen*, 70 Iowa, 202. See *Litchfield v. Ballou*, 114 U. S. 190, where bonds were issued by a city in excess of a constitutional limitation, and the holder was adjudged to have no remedy against the city. *Post*, sec. 529 a.

<sup>1</sup> *People v. Swift*, 31 Cal. 26 (1866); *Blen v. Bear River Co.*, 20 Cal. 602 (1862); *Peterson v. Mayor*, 17 N. Y. 449, 453 (1858), and authorities cited, reversing s. c. 4 E. D. Smith, 413; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Hoyt v. Thompson*, 19 N. Y. 207, 218 (1859); *Clarke v. Lyon Co.*, 8 Nev. 181 (1873); *Howe v. Keeler*, 27 Conn. 533; *Emerson v. Newberry*, 13 Pick. (Mass.) 377; *Hodges v. Buffalo*, 2 Denio (N. Y.), 110 (1846); 5 Denio (N. Y.) 567; *People v. Flagg*, 17 N. Y. 584; s. c. 16 How. (N. Y.) Pr. 36; *Brady v. Mayor, &c. of New York*, 20 N. Y. 312; affirming s. c. 2 Bosw. 173; *Delafield v. State of Illinois*, 2 Hill (N. Y.), 159, 176 (1841); s. c. 8 Paige, 531, and 26 Wend. 192; *Mills v. Gleason*, 11 Wis. 470 (1860); s. c. 8 Am.

Law Reg. 693; *Dubuque Fem. College v. Dubuque*, 13 Iowa, 555; *Merrick v. Plank Road Co.*, 11 Iowa, 74, *per Wright, J.*; *Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Crawshaw v. Roxbury*, 7 Gray (Mass.), 374; *Burrill v. Boston*, 2 Clifford C. C. 590 (1867); *Albany National Bank v. Albany*, 92 N. Y. 363; *City v. Hays*, 93 Pa. St. 72; *Galveston v. Morton*, 53 Tex. 409; *Strong v. District of Columbia*, 1 Mackey, 265; *Town of Durango v. Pennington*, 8 Col. 257; *Town of Bruce v. Dickey*, 116 Ill. 527; *Morris County v. Hinchman*, 31 Kan. 729; *Lincoln v. Stockton*, 75 Me. 141; *Davis v. Mayor of Jackson*, 61 Mich. 530; *Schmidt v. County of Stearns*, 34 Minn. 112; *Kinsley v. Norris*, 60 N. H. 131 (a vote authorizing an attorney to compromise or settle suits held a ratification of authority to commence them); *Moore v. Albany*, 98 N. Y. 396; *Lewis v. Shreveport*, 108 U. S. 282 (a city cannot ratify a subscription to a railroad, which it had no power to make, unless authorized to do so by statute). *Mere silence* on the part of a town will not create a ratification. *Otis v. Stockton*, 76 Me. 506; *post*, sec. 779, note.

A municipal corporation may *ratify unauthorized expenditures*, not *ultra vires*, which they deem beneficial to it, and such ratification, as in the case of natural persons, is equivalent to previous authority. *Backman v. Charlestown*, 42 N. H. 125; *Harris v. Canaan School District*, 8 Fost. (28 N. H.) 65; *Wilson v. Chester School District*, 32 N. H. 118; *Keyser v. Sunapee Charitable School District*, 35 N. H. 477; *Episcopal Society v. Dedham Episcopal Church*, 1 Pick. (Mass.) 372; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; *Trott v. Warren*, 2 Fairf. (11 Me.) 227; *Topsham v. Rogers*, 42 Vt. 199; *People v. Swift*, 31 Cal. 26. In *DeGrave v. Mon-*

make valid an unlawful act without the scope of corporate authority. An absolute excess of authority by the officers of a corporation, in violation of law, cannot be upheld; and where the officers of such a body fail to pursue the requirements of a statutory enactment under which they are acting, the corporation is not bound. In such cases the statute must be strictly followed; and a person who deals with a municipal body is obliged to see that its charter has been fully complied with: when this is not done, no subsequent act of the corporation can make an *ultra vires* contract effective.<sup>1</sup> The employment, however, by a municipal council, of an attorney to defend a policeman charged with an assault, does not adopt his act so as to render the city liable for the damages recovered against him.<sup>2</sup>

§ 464 (386). **Assent and Ratification.** — Where work done for a corporation without complete legal authorization is for a corporate purpose and is beneficial to it, and the price reasonable, strong *evidence of the assent* of the corporation is not required; *but such assent must be shown.* Ratification of the acts of a committee in building upon the land of a school district a more expensive house than they were authorized to do by the vote of the corporation cannot be inferred from the mere fact that the school is kept in it for a few weeks, there being no evidence that the corporation had knowledge of the over-expenditure, or had taken any action on the subject.<sup>3</sup>

mouth, 19 Eng. C. L. 300, it was held that the examination of weights and measures, which had been ordered by a mayor *de facto*, and which were the subject of the controverted contract, at a meeting of the corporation, and the subsequent use of some of them, recognized the contract for their purchase and made the corporation liable to pay for them. As to ratification of contracts for local improvements when not primarily a charge on the city, see *Murphy v. Louisville*, 9 Bush (Ky.), 189 (1872); *post*, sec. 481, note; *infra*, secs. 465, 813; 4 Broom Commentaries on Com. Law, 567. A vote ratifying an unauthorized contract cannot be rescinded at a subsequent meeting. *Brown v. Winterport*, 79 Me. 305.

<sup>1</sup> *Sault Ste. Marie Co. v. Van Dusan*, 40 Mich. 429; *Jefferson Co. v. Arrighi*, 54 Miss. 668; *Nash v. St. Paul*, 11 Minn. 174; *Hague v. Philadelphia*, 48 Pa. St. 528; *Brady v. Mayor*, 20 N. Y. 312; *Bryan v. Page*, 51 Tex. 332; *Peterson v. Mayor*, 17 N. Y. 449; *Cowen v. West Troy*, 43 Barb.

(N. Y.) 48; *Brown v. Mayor*, 63 N. Y. 239; *Hodges v. Buffalo*, 2 Denio (N. Y.), 110; *McDonald v. Mayor*, 68 N. Y. 23; *Smith v. Newburgh*, 77 N. Y. 130; *Green v. Cape May*, 41 N. J. L. 45, approving text; *Taymouth v. Koehler*, 35 Mich. 22; *Marsh v. Fulton Co.*, 10 Wall. 676; *Horton v. Thompson*, 71 N. Y. 513; *McCracken v. San Francisco*, 16 Cal. 591; *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 E. & I. App. C. 653; *Lewis v. Shreveport*, 108 U. S. 282; *Scott v. Shreveport*, 20 Fed. Rep. 714; *San Diego Water Co. v. San Diego*, 59 Cal. 517; *Bank v. Statesville*, 84 N. C. 169; *City of Laredo v. Macdonnell*, 52 Tex. 511.

<sup>2</sup> *Buttrick v. Lowell*, 1 Allen (Mass.), 172 (1861); *post*, secs. 479, 975; *Moore v. Mayor*, 73 N. Y. 238, approving text; *Bryan v. Page*, 51 Tex. 352; *Wilhelm v. Cedar Co.*, 50 Iowa, 254, approving text.

<sup>3</sup> *Wilson v. School District*, 32 N. H. 118 (1855). See, further, as to effect of use as a ratification, *Kingman v. School*

§ 465 (387). **Same subject.**—The *ratification*, whatever its form, must be by the *principal or by authorized agents*. This is well illustrated by a case where, by statute, certain agents or officers of a *State* were authorized to borrow money for public use, and for that purpose to sell its bonds at not less than their *par value*. They exceeded their power by selling for *less than par*, and *on credit*. It

District, 2 Cush. (Mass.) 425; *Davis v. School District*, 24 Me. 349; *Lane v. School District*, 10 Met. (Mass.) 462; *Chaplin v. Hill*, 24 Vt. (1 Dean) 628; *Fisher v. School District*, 4 Cush. (Mass.) 494; *Taft v. Montague*, 14 Mass. 285; *Keyser v. School District*, 35 N. H. 477; *Pratt v. Swanton*, 15 Vt. 147 (use of bridge by public).

In *Wilson v. School District*, above cited, Mr. Justice *Bell* well remarks: "In most cases where work and labor is performed upon real estate by contract, the mere fact that the owner makes use of the building or structure built upon his land furnishes no evidence of approval or acceptance, because he has no choice to reject it. Alone, the use of such buildings gives no evidence of acceptance. Accompanied by silence and absence of complaint, where to complain would be natural and suitable, or by any circumstance indicating acquiescence, it would be sufficient." 32 N. H. 125. As to *effect of acceptance of public work* by the agents of the town, see *Wadleigh v. Sutton*, 6 N. H. 15 (1832). Of school-house built upon a *quantum meruit* employment by a committee, but without a legal contract. *Kimball v. School District*, 28 Vt. 8 (1855). See, also, *Corwin v. Wallace*, 17 Iowa, 334; *Zottman v. San Francisco*, 20 Cal. 96 (valuable discussion); approved, *Murphy v. Louisville*, 9 Bush (Ky.), 189 (1872); *Jordan v. School District*, 38 Me. 164 (1854); *Reichard v. Warren County*, 31 Iowa, 381 (1871). Surveyor of highways cannot recover of the town for work voluntarily performed, there being no contract, not even if beneficial. *Sikes v. Hatfield*, 13 Gray (Mass.), 347 (1859); *infra*, sec. 466.

A public corporation is not liable for work done against, or even without, its direction or authority (such as building a bridge, road, school-house, &c.), although

these are afterwards used by the public or the district. *Loker v. Brookline*, 13 Pick. (Mass.) 343 (1832); *Knowlton v. Inhabitants, &c.*, 14 Me. (2 Shep.) 25, where note *critique* on, and remarks of *Mellen*, C. J., as to *Hayden v. Madison*, 7 Greenl. (Me.) 79; *Morrell v. Dixfield*, 30 Me. (16 Shep.) 157, 160; *Davis v. School District*, 24 Me. (10 Shep.) 349; *Hayward v. School District*, 2 Cush. (Mass.) 419 (1848); *Ib.* 426; *Moor v. Cornville*, 13 Me. 293 (1836) (where the action was brought by the surveyor or supervisor of highways, who built a bridge without pursuing the course pointed out by law); *Allen v. Cooper*, 22 Me. 133 (deciding that the power of a committee with authority to contract to make a road, does not embrace power to accept the work or waive performance). But if the work be done under belief of authority, as where it was performed under a contract with a committee who assumed to have authority, but who, in fact, had none, then if the corporation accept it, or even knowingly avail itself of it, it will be liable to pay a reasonable compensation; and a promise thus to pay may be implied on the part of a corporation from the acts of its general agent, or an agent with powers of a general character[?]. *Abbot v. Herman*, 7 Me. (Greenl.) 118; *Hayden v. Madison*, *Ib.* 79. "Perhaps these two cases carry the doctrine of the implied responsibility of corporations as far as it ought to be carried." *Per Emery, J.*, in *Ruby v. Abyssin. Society*, 15 Me. 306, 308 (1839). As to extent of powers of New England towns, see *ante*, secs. 29, 30. And see, particularly, *Jordan v. School District*, and other cases cited, *supra*; *Baltimore v. Reynolds*, 20 Md. 1 (1862); *Hague v. Philadelphia*, 48 Pa. St. 527; *Moore v. Mayor*, 73 N. Y. 238, approving text.

was contended that this contract was *ratified*, because the governor, after he knew of the contract, signed the bonds and caused them to be delivered, and because the auditor and some of the other State officers acted under the contracts, drawing money and receiving payments. But it was held that these officials were likewise agents of limited authority; that, as they would have had no power to make the contracts originally, they could not ratify them; that ratification must come from the principal, — the State, represented by its legislature.<sup>1</sup>

<sup>1</sup> *Delafield v. State of Illinois*, 2 Hill (N. Y.), 159, 175, where difference between ratification by a *State* and by other corporations or by individuals is clearly set forth by *Bronson, J.*; affirming s. c. 8 Paige, 531; s. c. further, 26 Wend. 192. In further illustration of the text, see *Hague v. Philadelphia*, 48 Pa. St. 527; *Hotchin v. Kent*, 8 Mich. 526; *Murphy v. Louisville*, 9 Bush (Ky.), 189 (1872); *Marsh v. Fulton County*, 10 Wall. 676 (1870), (a leading case in the Supreme Court of the United States on the subject of ratification); *Dubuque Fem. College v. Dubuque*, 13 Iowa, 555; *Estey v. Inhabitants of Westminster*, 97 Mass. 324; *Branham v. San Jose*, 24 Cal. 585; *Attorney-General v. Lathrop*, 24 Mich. 235 (1872); *Wilhelm v. Cedar County*, 50 Iowa, 254. The case of the City [of St. Louis] *v. Armstrong*, 56 Mo. 298 (1874), is a strong instance in which the city was held to ratify the acts of its officers by availing itself of the benefit of their acts. The case was this: The city wished to build a sewer through the defendant's lot; it was necessary to condemn or get his consent; he consented on condition that he could have three years in which to pay his proportion of the cost of the sewer; the officers of the city, without any express authority, so agreed. The sewer was built, and before the three years expired the city sued the defendant for his portion of the cost of the sewer; and it was held that the suit was prematurely brought, and that the city, by using the defendant's land under the agreement of its officers, was bound by that agreement. What would have been the rights if the city had put the defendant *in statu quo*, by condemning the right of way, and tendering the amount before bringing suit

for the cost of the sewer, was a question not involved, and not decided.

In applying the doctrine that *unauthorized corporate acts may be ratified*, other principles of law must be borne in mind. The care which, in this respect, should be observed, is very clearly set forth by *Denio, J.*, in giving judgment in *Peterson v. Mayor, &c. of New York*, 17 N. Y. 449, 454 (1858). "For instance, no sort of ratification can make good an act without the scope of the corporate authority. So where the charter or a statute binding upon the corporation has committed a class of acts to particular officers or agents, other than the governing body, or where it has prescribed certain formalities as conditions to the performance of any description of corporate business, the proper functionaries must act, and the designated forms must be observed, and generally no act of recognition can supply a defect in these respects." *Brady v. Mayor, &c.*, 20 N. Y. 312; *Hodges v. Buffalo*, 2 Denio (N. Y.), 110; 17 N. Y. 584; *Gates v. Hancock*, 45 N. H. 528; *Reilly v. Philadelphia*, 60 Pa. St. 467; *supra*, secs. 463, 464; *Wilhelm v. Cedar County*, 50 Iowa 254.

Where the corporation can only act by *ordinance*, the ratification must be by ordinance. *McCracken v. San Francisco*, 16 Cal. 591 (1860); *Pimental v. San Francisco*, 21 Cal. 351; *Cross v. Morristown*, 18 N. J. Eq. 305 (1867); *ante*, chap. xii.

*Legislature may*, within constitutional limits, *ratify or authorize ratification*. *Campbell v. Kenosha*, 5 Wall. 194; *Supervisors v. Schenck*, *Id.* 772; *Keithsburg v. Frick*, 34 Ill. 405; *Mills v. Gleason*, 11 Wis. 470; *Winn v. Macon*, 21 Ga. 275; *Grogan v. San Francisco*, 18 Cal. 590

§ 466 (388). **Letting to the Lowest Bidder.** — Where the charter or incorporating act requires the officers of the city to award *contracts to the lowest bidder*, a contract made in violation of its requirements is illegal; and in an action brought on such contract for the work, the city may plead its illegality in defence;<sup>1</sup> and neither the

(1861); *Hasbrouck v. Milwaukee*, 21 Wis. 217 (1866); *Mills v. Charleton*, 29 Wis. 400 (1872); s. c. 9 Am. Rep. 578 and note; *ante*, sec. 79; sec. 161, note. In *Shawnee County v. Carter*, 2 Kan. 115 (1863), the Supreme Court of *Kansas* held invalid, as not being within the rightful scope of legislative power, an act of the legislature which declared valid and binding *bonds* which had been issued by the county officers on account of the county court-house, and which *bonds* were not enforceable against the county because differing in form and substance from the warrants authorized by the statute. Such a strict limitation on legislative power is not generally asserted. See, on this point chap. iv. *ante*, and *post*, sec. 544.

<sup>1</sup> *Brady v. Mayor, &c. of New York*, 20 N. Y. (6 Smith) 312 (1859). It is intimated that it is not essential to the defence that the city should show a fraudulent collusion between the bidder and the officers awarding the contract. Whether the city is liable on a *quantum meruit* to one who has *bona fide* performed labor under a void contract, where the work has been accepted and used, was not determined. *Id.*; s. c. 2 Bosw. 173; 7 Abb. Pr. R. 234; 16 Abb. Pr. R. 432. As further illustrating the text, see *People v. Flagg*, 17 N. Y. 584; *Peterson v. Mayor, &c.*, 17 N. Y. 457, referring to but expressing no opinion upon *Christopher v. Mayor, &c.*, 13 Barb. (N. Y.) 567; *Appleby v. Mayor, &c.*, 15 How. (N. Y.) Pr. 428; *Harlem Gas Co. v. Mayor, &c. of New York*, 33 N. Y. 389; *Macey v. Titcombe*, 19 Ind. 135 (1862); *Bonesteel v. Mayor, &c.*, 22 N. Y. 162; *Smith v. Mayor, &c.*, 21 How. (N. Y.) Pr. 1; *Greene v. Mayor*, 60 N. Y. 303 (1875); reversing s. c. 1 Hun, 29; *Yarnold v. Lawrence*, 15 Kan. 126 (1875); *Dickinson v. Poughkeepsie*, 75 N. Y. 65, citing text; *Eager, In re*, 46 N. Y. 100; *Nash v. St. Paul*, 8 Minn. 172 (1863); s. c. 11 Minn. 174; *White v. New Orleans*, 15 La. An. 667; *State v. Barlow*, 48 Mo. 17

(1871); *post*, sec. 832, note; *Breevort v. Detroit*, 24 Mich. 322 (1872); *May v. Detroit*, 2 Mich. N. P. Rep. 235 (1871); *Shaw v. Trenton*, 49 N. J. Law, 339; *State v. Trenton* (N. J.), 12 At. Rep. 902 (1888); *Trenton v. Shaw* (N. J.), 10 At. Rep. 273 (1887); *Davenport v. Kleinschmidt* (contract to take water), Mont., 13 Pac. Rep. 249. There can be no recovery against a municipal corporation for *extra work* where the officers who requested it to be done had no authority. *Hague v. Philadelphia*, 48 Pa. St. 527; *O'Hara v. New Orleans*, 30 La. An. 152; *Addis v. Pittsburg*, 85 Pa. St. 379 (1877); *Bonesteel v. Mayor, &c. of New York*, 22 N. Y. 162. Thus a contract by S. to erect a building for a city stipulated that the work should be done according to certain plans and specifications; that a certain committee, or the architect, might direct in writing any deviations therefrom, in which cases such sums of money should be added to or deducted from the agreed price as the parties should judge the increase or diminution to be worth, and that no alterations should be paid for unless directed in writing. In excavating, the soil was found by the architect to require piles to be driven to secure a firm foundation; whereupon he furnished piling plans, directed S. to do the work, and orally promised him that he should be paid for it. *Held*, that the city was not bound by the architect's oral promise. *Stuart v. Cambridge*, 125 Mass. 102.

If the lowest bidder is required to give security and the law requires public notice of proposals, any contract without a compliance with the law is unauthorized and void. *Dickinson v. Poughkeepsie*, 74 N. Y. 65; *Eager, In re*, 46 N. Y. 100; *Maxwell v. Stanislaus*, 53 Cal. 389.

A provision that the "commissioners shall in no case proceed with the construction of any sewer except upon advertisement" to be let to the lowest bidder, applies only to a contract for original con-

municipality nor its subordinate officers can make a binding contract for such work except in compliance with the requirements of the law.<sup>1</sup> So where the charter requires any sale or lease of the real estate of a city *to be made at public auction to the highest bidder*, an ordinance of the council of the city making a lease of a portion of its realty, upon the payment of a rent reserved, is void.<sup>2</sup>

§ 467 (389). **Lowest Bidder; Patented Inventions.** — The Supreme Court of Michigan has affirmed, while the Supreme Court of Wisconsin and of other States have denied, the proposition that where a city charter provides that no contracts shall be made by the city except with the *lowest bidder*, after advertisement of proposals, it does not prohibit the corporation from contracting to lay *Nicholson pavement*, though the right to lay it is patented and owned by a

struction. If the original contractor abandons the work, it is not necessary to re-advertise and let to the lowest bidder, the original contractor being liable for the excess of cost over his contract price. *Leeds, In re*, 53 N. Y. 400 (1873).

Where contracts for public work are required by law to be made *by advertising proposals* and specifications, for the purpose of securing competitive bidding, such specifications must be definite as to the quantity as well as the quality of materials required, or the contract will be void. *Bigler v. New York*, 5 Abb. (N. Y.) N. Cas. 51.

Construction of New York Act of 1886, chap. 142, requiring sale at auction by municipal corporations of right to build and operate railways on streets to the highest bidder. See *People v. Barnard*, 110 N. Y. 548 (1888).

A bid for street-paving is not defective in not distinguishing between the portions of the improvement chargeable to the lots fronting on the street, and the portion chargeable to the city, where the relative proportions have already been fixed. *Beniteau v. Detroit*, 41 Mich. 116. Remedy of taxpayer. *Follmer v. Nuckolls Co.*, 6 Neb. 204; compare *Clark v. Dayton*, 16. 192. Whether, when the work is of such a character that its ultimate cost cannot be foreseen, there can be any choice among bids, *quære*. *McBrien v. Grand Rapids*, 56 Mich. 95.

The New York city charter of 1873, containing a provision similar to that stated in the text, was construed to require a submission for competition of every important item of a contemplated work. *Matter of Merriam*, 84 N. Y. 596. Where the charter is imperative that contracts for public works should be let to the lowest bidder and the lowest bidder withdraws his bid, it is the duty to advertise again and not to award the contract to the next lowest bidder. *Twiss v. Port Huron*, 63 Mich. 528 (1886); s. c. 30 N. W. Rep. 177.

<sup>1</sup> *Addis v. Pittsburg*, 85 Pa. St. 379 (1877).

<sup>2</sup> *San Francisco & Oakland R. Co. v. Oakland*, 43 Cal. 502 (1872).

Where the charter requires that all work for the city shall be let to the lowest bidder, after a prescribed notice of the time and place of letting shall have been given, and requires that similar notice shall be given where work is re-let, an assessment upon a lot for work done is void if the contract was let or re-let without notice. *Mitchell v. Milwaukee*, 18 Wis. 92 (1864); see, also, *Wells v. Burnham*, 20 Wis. 112; *Hasbrouck v. Milwaukee*, 21 Wis. 217 (1866). Owner may, in such case, restrain the sale. *Id.* The contract must be the same that was advertised. *Nash v. St. Paul*, 11 Minn. 174.



single firm. The question is close; but there seems, so far, to be a tendency in the courts to adopt the Wisconsin view.<sup>1</sup>

§ 468 (390). **Same subject.** — Where the municipal authorities were required by law to *advertise for sealed proposals* for making local improvements, and award the work to the *lowest responsible bidder*, to publish a notice of the award, and to allow the owners of the major part of the frontage to take the contract upon the same terms if they should desire, the court were of opinion that the city authorities had no power to do work which could not be contracted for in this mode, or which the abutters could not themselves perform, and that the award of a contract for a *patented pavement* to the assignee of the patentee, who had the exclusive right to lay the same, was unauthorized, and the contract void.<sup>2</sup>

As the purpose of such a provision in the charter is to secure, through competition, the most advantageous terms, something is necessarily left to the discretion, to be fairly exercised of course, of

<sup>1</sup> *Dean v. Charlton*, 23 Wis. 590 (1869); *Nicholson Pavement Co. v. Painter*, 35 Cal. 699; *Hobart v. Detroit*, 17 Mich. 246 (1868). *Dean v. Charlton*, *supra*, was approved by *Sutherland, J.*, in *Dolan v. Mayor, &c. of New York*, 4 Abb. Pr. (N. S.) 397 (1868), and followed by the Supreme Court of *Louisiana* in *Burgess v. Jefferson*, 21 La. An. 143 (1869), in which it appeared that the contractors with the city had the exclusive right to lay the patented pavement in the State. But under provisions of law relating to the city of New York, which require all work to be done and supplies to be furnished to be by contract, where the expenditure will exceed \$1,000, and which direct all contracts to be made or let, after advertisement, to the lowest bidder, the city council is not, in the opinion of the Court of Appeals, prohibited from making or paying a street in the manner or with materials which do not admit of competitive bids. *Dugro, In re*, 50 N. Y. 513 (1873). The subject is discussed by *Brewer, J.*, in *Yarnold v. Lawrence*, 15 Kan. 126 (1875), who inclined to the *Michigan* view, but the question was not decided by the court. Further, as to rights of lowest bidders, see *Attorney-General v. Detroit*, 41 Mich. 224; s. c. 12 Am. Law Reg. (N. S.) 149; see also *Detroit v. Robinson*, 42 Mich. 198;

*Detroit v. Robinson*, 38 Mich. 108; *post*, secs. 468, 870, note, 909, 791, note. Sequel to *Dean v. Charlton*, *supra*, see *Mills v. Charleston*, 29 Wis. 400, and *Dean v. Borchenius*, 30 Wis. 236, the legislature having validated the assessment. *Post*, sec. 814 and note. See, also, *Eager, In re*, 46 N. Y. 100 (1871). Liability of city to patentee to pay him "royalty." *Bigelow v. Louisville*, 3 Fish. Pat. Cas. 602 (1869); *post*, sec. 966. Where a charter does not require a contract to be let to the lowest bidder after advertising for proposals at the expense of abutters, although such contracts may be made by private agreement with the city, they must be fairly made at reasonable prices, with due regard to the lot-owners' interests, or equity will relieve against them. *Cook v. Racine*, 49 Wis. 243; s. c. 5 N. W. Rep. 352.

<sup>2</sup> *Nicholson Pavement Company v. Painter*, 35 Cal. 699 (1868). This case was decided before *Dean v. Charlton*, *supra*, and the opinion of *Sanderson, J.*, in its general scope, sustains the view of the *Wisconsin* court; and approving of the language of *Field, C. J.*, in *Zottman's Case*, 20 Cal. 102, treats "the mode as constituting the measure of the power." *Post*, chap. xix.; *ante*, sec. 98; *post*, sec. 669.

the council, in the adoption of the course which will best attain the end; and it does not contravene this restriction to call for bids for putting down various kinds of wood and stone pavements, some patented and some not, and afterwards, when all the proposals are in, selecting the one which is relatively the lowest or the most satisfactory, all things considered; but when the kind is thus selected, the lowest responsible bidder who has the lawful power to perform his undertaking, has the absolute legal right to have the contract awarded to him.<sup>1</sup>

§ 469 (391). **Lowest Bidder; Exclusive Right.** — In an action on a contract for lighting certain streets in New York City with gas, it appeared that the company had, by law, *the exclusive right* to furnish that part of the city with gas. The charter of the city, however, required all contracts for wants and supplies beyond a certain value, which the contract in suit exceeded, *to be let to the lowest bidder*, and the contract not being so let, it was claimed to be void. It was held that since the company had the exclusive right to furnish the gas (which prevented competition), the provision of the charter requiring contracts to be let to the lowest bidder (with a view to secure competition) was inapplicable, and the contract was sustained under the general corporate power of the city to contract for the lighting of its streets.<sup>2</sup>

§ 470 (392). **When Contract completed.** — Although *notice has been published inviting proposals* to do public work, yet the contract is incomplete until the proposal is actually accepted, and the corporation inviting the proposal is not, it seems, liable to damages for *refusing to accept an offer*, even though it be the lowest regular offer made. It is certainly not thus liable where the notice and the proposals with respect to the amount and form of the security, do

<sup>1</sup> Attorney-General v. Detroit, 41 Mich. 224; s. c. 12 Am. Law Reg. (N. S.) March, 1873, p. 149. Remedy of lowest bidder when contract is awarded to another. *Ib.*; Kelly v. Chicago, 62 Ill. 279 (1871); *post*, chap. xxii. sec. 917.

The council of a city held to have no power to contract for the grading of a street until they first shall have enacted an ordinance for the said improvement, nor except such contract be let to the lowest bidder, after publication of notice and fair competition. *Fulton v. Lincoln*, 9 Neb. 358.

<sup>2</sup> *Harlem Gas Co. v. New York*, 33 N. Y. 309. Where a city has authority to contract therefor, it cannot resist payment for gaslight furnished, because of illegal promises as to the particular fund from which payment would be made. The consideration of such promises being legal, the price would be payable, if not otherwise, out of the general fund; and the objectionable provisions may be rejected, and the rest of the contract permitted to stand. *Nebraska City v. Nebraska Gas Co.*, 9 Neb. 339.

not comply with the requirements of the ordinances of the city, and where these provided that contracts should not be executed until laid before the common council.<sup>1</sup> The rule against combinations to prevent bidding at auction sales applies to proposals for government work, in response to a call therefor, aiming at a contract with the lowest bidder; and a combination of contractors whereby the privilege of bidding is secured by one, without competition, is against public policy and illegal; and if it results in a letting at unreasonable prices, it authorizes a rejection of the proposal or a repudiation of the contract.<sup>2</sup>

§ 471 (393). **Contracts of Suretyship.** — A municipal corporation cannot, without legislative authority, become surety for another corporation or an individual; cannot guarantee the bonds or obligations of another, or make accommodation indorsements. Such an authority cannot be implied or deduced from the general and usual powers conferred upon such corporations. Although such a corpo-

<sup>1</sup> *Smith v. Mayor, &c. of New York*, 10 N. Y. (6 Seld.) 504 (1853), affirming s. c. 4 Sandf. S. C. R. 221. "The notice inviting proposals to do the work," says *Willard, J.*, delivering the opinion of the Court of Appeals (10 N. Y. 504), "did not, in my judgment, bind the street commissioner of the corporation to accept, at all events, the lowest bid, even though in all respects formal. Until the bid is accepted by some act on the part of the corporation, no obligatory contract was created." See, also, *People v. Croton Aqueduct Board*, 26 Barb. (N. Y.) 240; *Greene v. Mayor, &c. of New York*, 60 N. Y. 303 (1875); *State v. Directors, &c.*, 5 Ohio St. 234 (1855); *Altemus v. Mayor, &c.*, 6 Duer (N. Y.), 446; *Argenti v. San Francisco*, 16 Cal. 255; *Wiggins v. Philadelphia*, 2 Brews. (Pa.) 444; *Ib.* 443; *Keogh v. Wilmington*, 4 Del. Ch. 491.

A board of commissioners charged with the duty of contracting for a public work need not call for bids or proposals unless expressly required. But if they choose to invite competition, they may, after accepting a bid, alter the specifications furnished by the bidder before executing the contract; and this without the knowledge of competing bidders. *Kingsley v. Brooklyn*, 5 Abb. (N. Y.) N. Cas. 1. The duties and liabilities of a city and its officers under a contract for the build-

ing of extensive water-works, considered. A provision in the act authorizing the work, for the preliminary adoption of a "plan" therefor by the city, does not prevent subsequent changes in the details of the work. And where, after alterations had been made and extra work directed during the progress of the undertaking, the contractors were stopped by the city before completing it, — *Held*, that they could recover for work done up to the limits of the appropriation authorized by the act, though the work was incomplete, the legislature having recognized the necessity of further outlay by an act authorizing an additional appropriation. Where a public work is, under a statute, to be contracted for by city officers according to a plan to be adopted by the city, with a proviso that the whole expense shall not exceed a certain sum, to be raised by issuing city bonds, a contract for doing the work for a sum within that amount is valid, although it reserves authority to the officers directing the work to make such changes of detail as may be necessary, and fix the price of whatever extra work may be required. *Ib.*

Further as to *lowest bidder*, see chapter on *Mandamus*, *post*, sec. 832, note; sec. 1027, note.

<sup>2</sup> *People v. Stephens*, 71 N. Y. 527.

ration may have power directly to accomplish a certain object, and itself expend its revenues or money therefor, yet this does not give or include the power to lend its credit to another who may be empowered to effect the same object. Expending money by a city council, as agents or administrators of their constituents, is a very different thing from binding their constituents by a contract of suretyship,—"a contract which carries with it a lesion by its very nature." Thus, the indorsement of the bonds of a street railroad company in a city, by the city authorities, is not within the ordinary administrative powers of the corporation, and requires express legislative grant.<sup>1</sup>

§ 472 (394). **Authorized Contracts ; Rights and Liabilities.**—But with respect to authorized contracts a municipal corporation has the

<sup>1</sup> Louisiana State Bank v. Orleans Navigation Co., 3 La. An. 294 (1848). In this case the municipal corporation was sought to be made liable upon its guaranty of bonds issued by the Navigation Company, which the mayor, in the name of the municipality, was authorized, by certain resolutions of the council, to indorse. It was held that the council transcended its powers, and the guaranty did not impose any legal obligation upon the municipality. The disability of such corporations, without express power, to enter into contracts of suretyship is shown in the masterly and exhaustive opinion delivered by *Eustes*, C. J. See, also, *Blake v. Mayor, &c. of Macon*, 53 Ga. 172 (1874). In this case *McCay, J.*, says: "The objects of a municipal corporation are, in the main, the preservation of order, and the doing of such acts for the public good as cannot well be done by private enterprise. But here is a private enterprise; and it is insisted that it is within the scope of municipal power not to build a street road, but to aid, by a donation of the credit of the city, a private corporation to build it, and to take the profits of it. We do not think this is within the ordinary scope of municipal authority, nor can any authorities, as we believe, be found carrying the objects of a corporation that far. We are clear that the proposed indorsement is *ultra vires*."

A municipal corporation has no *implied power* to lend its credit or make accommodation paper for the benefit of citizens, to

enable them to execute private enterprises. *Clark v. Des Moines*, 19 Iowa, 199, 224 (1865); 1 *Parsons N. & B.* 166; *Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104.

The power to *borrow money* for any public purpose does not authorize the loan of the credit of the city. *Chamberlain v. Burlington*, 19 Iowa, 395; *contra*, *Rogers v. Burlington*, 3 Wall. 654, four judges dissenting. In *Dutton v. Aurora*, 114 Ill. 138, *Schofield, J.*, said: "Having power to borrow money, the power to issue bonds therefor results as a necessary incident." *Ante*, sec. 117. And see *Meyer v. Muscatine*, 1 Wall. 384. The author can but think that power to a corporation to borrow money should not be construed to give the power to loan its credit, but only to borrow money for legitimate and proper municipal objects, as shown by the charter or constituent act of the corporation. See *Payne v. Brecon*, 3 Hurl. & Nor. 572; *ante*, sec. 117; *Bateman v. Mid-Wales Railway Co.*, Law Rep. 1 C. P. C. 510. Power to guarantee payment of authorized contracts. *Memphis v. Brown*, 20 Wall. 289 (1873). If city pays its unauthorized guaranty it is subrogated to the rights and lien of the creditor. *Supra*, sec. 458, note. Private corporations cannot without legislative sanction guarantee obligations which are beyond the scope of their chartered powers. *Davis v. Old Colony R. R. Co.*, 131 Mass. 258. *Morawetz on Corp.* (2d ed.) 423.

same rights and remedies, and is bound thereby and may be sued thereon in the same manner as individuals.<sup>1</sup> Thus, if such a corporation, duly empowered, enters into a partnership relation with private individuals with respect to the profits to be derived from a market-house, its rights, especially as regards the copartners and the financial administration of the partnership property, are not different from those of an ordinary partner.<sup>2</sup>

§ 473. **Power to Contract illustrated.**—A city incorporated under the general law of Indiana *has power, with respect to the lighting of its streets and public buildings, &c., to contract with a gas company on that subject, and may exercise such power within the limits of its franchise according to its own discretion.* Such a contract, when made, must be regarded as made by such city in the exercise of its power to contract and not in its power to legislate, although the power to make the contract be authorized by an ordinance. And when, by the terms of such contract, the city is not restricted from the legitimate exercise of its public power touching the subject-matter thereof, but expressly reserves its administrative authority to keep the posts, lamps, and burners in good repair if the company should fail to do so, and also reserves the right to test the quality of the gas furnished by said company, and the capacity of the burners at all times, and is not restricted from extending its streets, establishing an additional number of lamps, obtaining gas from other sources, or establishing its own gas-works as the public interests may require, such contract, not being a restriction upon its legislative power nor fraudulent nor against public policy, is valid

<sup>1</sup> Corporations may make contracts within the powers expressly granted by the acts of their creation and the implied powers incidental and necessary to the execution of such expressed powers and the performance of the duties enjoined upon them. For these purposes it will be bound to perform them the same as individuals. *Hight v. Monroe Co.*, 68 Ind. 576; *Seibrecht v. New Orleans*, 12 La. An. 496; *Strauss v. Ins. Co.*, 5 Ohio St. 59; *Douglass v. Virginia City*, 5 Nev. 147; *Hayward v. Davidson*, 41 Ind. 212; *McCabe v. Fountain Co.*, 46 Ind. 380; *Burnett v. Abbott*, 51 Ind. 254; *Gordon v. Dearborn Co.*, 52 Ind. 322; *Jackson Co. v. Applewhite*, 62 Ind. 464; *Jennings Co. v. Verbar*, 63 Ind. 107; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396, citing and approving text.

<sup>2</sup> *New Orleans v. Guillotte*, 12 La. An. 818 (1857). In *New Orleans v. St. Louis Church*, 11 La. An. 244 (1856), it was contended by the counsel for the city that even if certain resolutions, in favor of the defendants, allowing them to establish a cemetery within the city, amounted to a contract, and though their repeal be not justified by the facts, and be a violation of the contract by the city, yet that the latter has the power to violate its contracts, and the defendants have no redress except in an action for damages. But this doctrine was rejected by the court, which declared it to be as "unsound as it is novel," since a liability for damages is "the very opposite of a recognition of a right to violate the contract." *Per Buchanan, J.*

and binding upon such city, and may be enforced in the same manner as the contract of a person or business corporation, and cannot be repealed, impaired, or changed by the city, by ordinance or otherwise.<sup>1</sup>

§ 474 (395). **Same subject.** — So where a municipal corporation, acting within the scope of its powers, *in order to secure the erection of gas-works*, passed an ordinance whereby the gas-works and their income were placed in the hands of trustees for the benefit of those who loaned money to execute the undertaking, *such ordinance is a contract*, and cannot be violated by the city, although it may deem it for the interest of its citizens to do so; nor is it in the power of the legislature to authorize its violation.<sup>2</sup>

§ 475 (396). **Same subject.** — So where the mayor and council have, by the charter, power to make, in their corporate capacity, all such contracts as they may deem necessary for the welfare of the corporation, they *may contract to sell stock owned by the city* in a private corporation, to enable the city to pay its debts; and the discretionary power with which the mayor and council are invested cannot, when *bona fide* exercised, be controlled by a court of equity, at the instance of property owners and taxpayers.<sup>3</sup>

§ 476 (397). **Same subject.** — Power to a city corporation *to pave streets at the expense of the owners* and recover the amount from them if they fail themselves to pay when required by ordinance, gives the corporation the power to *purchase paving materials* and incur a debt for that purpose; and in a suit by the vendor of such materials against the corporation, it is no defence that the council had not passed an ordinance before they purchased the materials, requiring the owners to pave: this is a matter to which a creditor is not bound to look. The question would be different if the city had sought to make the lot-owner liable for the cost of paving; in such case, it must show a strict compliance with the requirements of its charter.<sup>4</sup>

<sup>1</sup> *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396; *Valparaiso v. Gardner*, 97 Ind. 1.

<sup>2</sup> *Western Savings Fund Society v. Philadelphia*, 31 Pa. St. 175 (1858); *Same v. Same*, 31 Pa. St. 185 (1858); *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396, citing and approving text; *ante*, chap. iv. sec. 69.

<sup>3</sup> *Semmes v. Columbus*, 19 Ga. 471

(1856); followed and text approved, *Shannon v. O'Boyle*, 51 Ind. 565 (1876); *Athens v. Carnak*, 75 Ga. 429; *Adams v. Rome*, 59 Ga. 771; *ante*, sec. 94; *post*, chapter on Corporate Property, sec. 575; *post*, chap. xx.; *Bush v. Carbondale*, 78 Ill. 74 (1875).

<sup>4</sup> *Bigelow v. Perth Amboy*, 1 Dutch. (N. J.) 297 (1855); *post*, chap. xix.

§ 477 (398). **Settlement of Disputed Claims, &c.** — Growing out of its authority to create debts and to incur liabilities, a municipal corporation has power to *settle* disputed claims against it, and an agreement to pay these is not void for want of consideration.<sup>1</sup> If it has obtained a contract which, by mistake or a change of circumstances, it deems to operate oppressively upon the other party, an agreement to make an *additional compensation*, or to modify or annul it, is not invalid for want of consideration.<sup>2</sup>

<sup>1</sup> *Augusta v. Leadbetter*, 16 Me. 45 (1839); *Bean v. Jay*, 23 Me. 117, 121 (1843); *People v. Supervisors*, 27 Cal. 655; *People v. Coon*, 25 Cal. 648. A municipal corporation has power to settle disputed claims. In this case the acceptance by a city council of \$100 in payment of a judgment for \$200 obtained before a justice of the peace, from which the defendant was about to appeal, was held a proper exercise of corporate power. *Agnew v. Brall*, 124 Ill. 312 (1888). A town board of supervisors held to have no power, unless expressly conferred, to discharge a judgment in favor of the town except upon full payment thereof, nor to allow credits upon it of sums not allowed by the court. *Butternut v. O'Malley*, 50 Wis. 329. It may annex conditions to a proposal of settlement, and is not liable unless the conditions are met. *Merrill v. Dixfield*, 30 Me. 157 (1849). A municipality may, without special grant, issue new bonds in the place of old bonds which had been issued according to law. *Rogan v. Watertown*, 30 Wis. 259 (1879). Bonds issued to raise money to pay bonds of an older issue will be declared valid in equity, though the statute authorizing them required the recall and cancellation of the old bonds before their issue. *State v. Columbia*, 12 S. C. 370. Where new bonds were issued to replace old ones, a recital by the mayor and council in a proclamation submitting the question of issuing them to a vote, that they were assured the old bonds would be surrendered, was held not to be a condition for issuing the new bonds; if otherwise lawful they were valid obligations. *Sullivan v. Walton*, 20 Fla. 552; *infra*, sec. 504, note.

<sup>2</sup> *Bean v. Jay*, 23 Me. 117, 121; *Meech v. Buffalo*, 29 N. Y. 198 (1864). Further, as to consideration, *Baileyville v. Lowell*, 20 Me. 178 (1841); *Nelson v. Milford*, 7

*Pick. (Mass.)* 18 (1828), valuable opinion of *Parker, C. J.*; see *People v. Stout*, 23 Barb. (N. Y.) 349; *ante*, chap. iv. sec. 75. The power to sue and be sued gives to a corporation the right to settle or compromise claims. Where a city has a judgment, from which an appeal is about to be taken, the council may, if done in good faith, cancel the judgment on the payment of costs; and such an agreement, when executed, is binding upon the corporation. *Petersburg v. Mappin*, 14 Ill. 193 (1852); *Orleans Co. Sup. v. Bowen*, 4 Lansing (N. Y.), 24. The cases above cited in this note are reviewed by *Richardson, C. J.*, in *Barnes v. District of Columbia*, 22 Court of Claims Rep. 366 (1887), and the conclusion reached that the doctrine of the text did not apply to the case before the court, under the legislation of Congress as to the power of the Board of Public Works of the District of Columbia to make contracts, under which it is held that such legislation provides how contracts by the Board for public improvements shall be made, and that if there is material departure from the requirements of the statute the contract is not binding. *South Boston Iron Co. v. U. S.*, 118 U. S. 37, affirming 18 Court of Claims, 165; *Brown v. District of Columbia*, 127 U. S. 579 (1887). In *Louisiana* the president of a police jury has no power to institute a suit in its behalf without special authority conferred by ordinance or resolution, and parol testimony is not admissible to prove either. *Police Jury of Ouachita v. Monroe*, 38 La. An. 630. The legislature may authorize municipal corporations to sue, without payment of costs or complying with other requirements imposed upon natural persons or private corporations. In this case an appeal by a city without having given a *supersedeas* bond

A town may make a contract with a creditor whereby the latter agrees to discount or throw off a portion of his debt, and such an agreement, if founded on a sufficient consideration, will be enforced.<sup>1</sup>

§ 478. **Power to arbitrate Claims.** — As a general proposition, municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds *power to adjust all disputed claims*, and when the amount is ascertained to pay the same as other indebtedness. It would seem to follow therefrom that a municipal corporation, unless disabled by positive law, *could submit to arbitration* all unsettled claims with the same liability to perform the award as would rest upon a natural person, provided, of course, that such power be exercised by ordinance or resolution of the corporate authorities.<sup>2</sup> It is no objection to the validity of such ordinance that it was passed at a meeting of the city council at which all members were not notified to be present, provided that the ordinance be approved at a subsequent regular meeting. Nor is the ordinance an act *ultra vires* the corporation, although the work for which damages are claimed was done outside of the city limits, provided it is a part of a work which the corporation has power to perform.<sup>3</sup> In some cases it is held that a city has no power to submit to arbitration claims for damages arising under the power of eminent domain.<sup>4</sup>

was sustained. *Holmes v. Mattoon*, 111 Ill. 37.

<sup>1</sup> *Baileyville v. Lowell*, 20 Me. 178 (1841). In this case, the town, against which the creditor had an execution, had the option, and was authorized, to raise the money by loan or by assessment; and if in the latter mode, either at once or by instalments. If not raised and paid, the creditor was authorized to cause the property of the inhabitants to be distrained upon his writ. It was held under these circumstances, that an agreement by the creditor, which was accepted and complied with by the town, that if the town would at once assess the amount required, and collect the same, he would abate a portion of his debt, was founded upon a sufficient consideration, and was binding upon him. A statute which *allows a debtor of a municipal corporation to procure its obligations*

and set them off against his debt is not unconstitutional for divesting creditors of their vested rights, or as impairing the obligations of contracts. *Amy v. Shelby County Taxing District*, 114 U. S. 387.

<sup>2</sup> Text approved, *Springfield v. Walker*, 42 Ohio St. 543, holding also that municipal corporations are "persons" within the meaning of the statute of Ohio — R. S. sec. 4947 — concerning arbitrations.

<sup>3</sup> *City of Shawneetown v. Baker*, 85 Ill. 563; *Dix v. Dummerston*, 19 Vt. 263; *Griswold v. Stonington*, 5 Conn. 367; *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83. Power exists unless the corporation be disabled. *Eldon Tp., In re*, 6 Upper Can. Law Jour. 207; *Brant County, In re*, 19 Upper Can. Q. B. 450; *District Township of Walnut v. Rankin*, 70 Iowa, 65.

<sup>4</sup> *Post*, chap. xvi.



§ 479 (399). **Contracts with Attorneys.** — Resulting also from the power to make contracts, to own property, and to incur liabilities, is the authority in a municipal corporation, in the absence of express or implied restriction, to *employ an attorney*<sup>1</sup>

<sup>1</sup> *Smith v. Sacramento*, 13 Cal. 531; *State v. Paterson*, 40 N. J. L. 186. May employ, unless specially restricted, an attorney in addition to the city attorney. *Id.* The employment of outside counsel must, of course, be duly authorized by the municipality. *Memphis v. Brown*, 20 Wall. 289, 321 (1873); *Memphis v. Adams*, 9 Heisk. (Tenn.) 518 (1872); s. c. 24 Am. Rep. 331; *Clark v. Lyon Co.*, 8 Nev. 181, (1872); *Ellis v. Washoe Co.*, 7 Nev. 291; *Butternut v. O'Malley*, 50 Wis. 333 (to make substitution); *Roper v. Laurinburg*, 90 N. C. 427 (counsel employed to defend police officers in actions for false imprisonment); *Waterbury v. Laredo*, 60 Tex. 519, where a power to establish ferries was held to imply a power to employ counsel to represent the city in a matter involving their establishment, and to secure his fees. *Ante*, sec. 147; see *Hornblower v. Duden*, 35 Cal. 664; compare *Clough v. Hart*, 8 Kan. 487. This case holds that there is *prima facie*, if not absolutely, an implied restriction upon city and county corporations to employ other attorneys to perform the precise duties, as prescribed by law, of the city and county attorneys elected by the people or provided for by incorporating statutes. Compare *Thacher v. Jefferson Co.*, 13 Kan. 182, and cases cited; *Hugg v. Camden* (right to employ counsel in addition to the city solicitor), 29 N. J. Eq. (2 Stewart) 6 (1878). Where a charter gave power to a municipal corporation to employ an attorney when necessary, and a subsequent statute provided for a law department, and a chief officer to be called Attorney and Counsel, with a salary, the department to have charge of and conduct *all* the law business of the corporation, it was held that the subsequent statute was an implied repeal of the power to employ an attorney under the charter. *Lyddy v. Long Island City*, 104 N. Y. 218 (1887). A municipal corporation which has employed an attorney to file a bill seeking to destroy by suit the existence of the corporation itself, cannot apply the corporate

funds in payment of such services. *Daniel v. Memphis*, 11 Humph. (Tenn.) 582 (1851); *ante*, sec. 147; *post*, sec. 910, note. A municipal corporation has no power to employ counsel to defend a suit exclusively directed against *its officers*, though its object be to enjoin them from performing their official functions and to appoint a receiver of its corporate property. *Smith v. Nashville*, 4 Lea (Tenn.), 69; *ante*, sec. 147. When suit is brought in the name of a municipal corporation without authority it may be dismissed, on motion of the defendant, or by the court of its own motion when its attention is called to the fact. *Kankakee v. Kankakee & Ind. R. R. Co.*, 115 Ill. 88.

Unless there is some special restriction the corporation may incur liability to compensate an attorney employed by it to conduct or defend suits which relate to the due performance of the duties or trusts with which, in its corporate capacity, it is charged by law. *Attorney-General v. Mayor, &c. of Norwich*, 2 Myl. & Cr. 406; *Lewis v. Mayor, &c. of Rochester*, 9 Com. B. (N. s.) 401 (1860); *ante*, sec. 147. A city owning stock in a railroad company in another State may, in virtue of such ownership, unless specially restricted, employ counsel to attend to its interests in such State. *Memphis v. Adams*, *supra*. The Supreme Court of *Wisconsin* hold that no action will lie against a city having "the general powers of municipal corporations at common law," to recover compensation for services of counsel to aid in *criminal prosecutions* against persons who had lately been officers of the city, for offences committed under color of their official duties, resulting in pecuniary injury to the city. *Butler v. Milwaukee*, 15 Wis. 493. In *Indiana* a county board has no power to employ counsel to conduct criminal prosecutions, and cannot be compelled to pay for services rendered. *Hight v. Monroe Co.*, 68 Ind. 575; *Ripley Co. v. Ward*, 69 Ind. 441; *Grant Co. v. Bradford*, 72 Ind. 455. In *Iowa*, the board of supervisors

to conduct or defend suits in which the corporation is interested in its corporate capacity; and the corporation is bound to pay for services rendered by him on due employment, without an express vote to that effect.<sup>1</sup> If a corporation attorney, after his term of office has expired, continues in the management of suits in which the corporation is interested, without objection from, and with the knowledge of, the corporation and of his successor, he may, it has been held, recover for such services.<sup>2</sup> An attorney was *employed upon a quantum meruit* by the city to conduct a case to a final termination, and pending the litigation was appointed city counsellor, when it became his official duty to act for the city; and it was held that, in the absence of an express contract, he could not recover for the value of such services as were rendered after his appointment. It might be otherwise if the original employment had been to carry the suit through for an agreed sum.<sup>3</sup>

may employ special agent or attorney to assist in the collection of taxes not collectible by county treasurer in the discharge of his duty. *Withelm v. Cedar Co.*, 50 Iowa, 524. Compare *ante*, sec. 139, and cases there cited, as to power to offer rewards for offenders. *Buttrick v. Lowell*, 1 Allen (Mass.), 172. Cannot recover for defending pauper criminals in *Alabama*. *Posey v. Mobile Co.*, 50 Ala. 6 (1873). A duly qualified city attorney, having charge of the interests of a city in its legal controversies, has power to *pray an appeal* from a judgment against it, and to take the necessary steps to perfect the same. *Connett v. Chicago*, 114 Ill. 233.

<sup>1</sup> *Langdon v. Castleton*, 30 Vt. 285 (1858); *ante*, sec. 147.

<sup>2</sup> *Ib.*; see *Harrington v. School District*, 30 Vt. 155; *supra*, sec. 459, as to implied contracts. Compare *Clough v. Hart*, 8 Kan. 487. Compensation of city attorney. See *Carroll v. St. Louis*, 12 Mo. 444; *Orton v. State*, 12 Wis. 509; also, chapter on Corporate Officers, *ante*. Liability for attorney's fee under charter or special statutes, see *Brady v. Supervisors*, 2 Sandf. S. C. R. 460, affirmed 10 N. Y. (6 Seld.) 260 (1851), for reasons given by *Oakley, C. J.*, in 2 Sandf. 460; *Halstead v. Mayor, &c. of New York*, 3 Comst. (3 N. Y.) 430; *Memphis v. Brown*, 20 Wall. 289 (1873); *State v. New Orleans*, 20 La. An. 172; *Bright v. Hewes*, 19 La. An.

666; *Parker v. Williamsburg*, 13 How. Pr. (N. Y.) 250; *Clough v. Hart, supra*, and cases cited by *Valentine, J.* Proof of employment. *Butler v. Charlestown*, 7 Gray (Mass.), 14; *Memphis v. Brown*, 20 Wall. 289, 321; *Memphis v. Adams*, 9 Heisk. (Tenn.) 518; s. c. 24 Am. Rep. 331; *Cass Co. v. Ross*, 46 Ind. 404 (1874); *McCabe v. Fountain Co.*, 46 Ind. 380.

<sup>3</sup> *Detroit v. Whittemore*, 27 Mich. 281 (1873). Construction of power to employ private counsel. *Ib.* In employing counsel the board of county commissioners acts as a corporation, and like other corporations, may, unless the statute otherwise requires, employ agents and attorneys without making such employment a matter of record, but this must be done by the concurrent act of a majority of the board at a legal session. Such attorney may recover compensation for his services. *McCabe v. Fountain Co. Comm'rs*, 46 Ind. 380 (1874). The city council under the laws of *Iowa*, while acting as a board of equalization, is discharging a corporate function and acting as a representative of the city, and if its action is appealed from, the city solicitor is justified in defending it in the appellate court; for which service he is entitled to reasonable compensation, even though the service or the compensation be not provided for by city ordinance. *Kinnie v. Waverly*, 42 Iowa, 437 (1876). *Extra compensation. Ante*, sec. 233.

§ 480 (400). **Contracts for Local Improvements.** — A municipal corporation contracted with a paver to do certain work at a fixed price, of which it was to pay one third, and the owners of the abutting property two thirds. It was judicially determined that the proprietors were, in law, liable to pay only one third; and it was held, in an action by the paver against the corporation, that it was a *warrantor* for the remaining one third; and it was held liable accordingly.<sup>1</sup> But where the charter or constituent act in reference to improving streets provides that the *city shall be liable to the contractor for so much only* of the improvement as is occupied by streets and alleys crossing the same, and that the owners of adjacent lots shall be liable for the rest, the city is not liable for the deficiency in case the adjacent property does not sell for enough to pay the assessment, and though the owner be a non-resident.<sup>2</sup>

<sup>1</sup> *Touner v. Municipality*, 5 La. An. 298. So where a city by ordinance directed that a sewer be constructed, reciting that the action was taken upon petition of a majority of property owners, and the work was discontinued because it appeared that a majority had not petitioned, the city was held to be liable to pay for the services of an inspector employed by it for the work, on the ground that there was an implied guaranty that the petition was sufficient. *Bill v. Denver*, 29 Fed. Rep. 344. See also *Cronan v. Municipality*, 5 La. An. 537, where by the construction of the contract, the city was held liable for the whole expense, the proprietors having refused to make payment. A contractor failing, for *want of power* in a city, to be able to get his pay from special assessments, the city was held liable to him, it being regarded as guaranteeing that it possessed the specific powers relied on by the contractor for his compensation. *Maher v. Chicago*, 38 Ill. 266 (1865); *Scofield v. Council Bluffs*, 68 Iowa, 695; *Bucroft v. Council Bluffs*, 63 Iowa, 646. But see *Chicago v. People*, 48 Ill. 416, where the first case is explained and distinguished. See also *Reilly v. Philadelphia*, 60 Pa. St. 467; *Sleeper v. Bullen*, 6 Kan. 300 (1870); *Chicago v. People*, 56 Ill. 327; *Lowden v. Cincinnati*, 2 Disney (Ohio), 203. Right of contractor to sue the corporation where, in consequence of its neglect, it would be nugatory to proceed

against the owners of the property. See *Michel v. Police Jury*, 9 La. An. 67; *Newcomb v. Same*, 4 Rob. La. 233; *Michel v. Same*, 3 La. An. 123; *Leavenworth v. Mills*, 6 Kan. 288 (1870); distinguished, *Casey v. Leavenworth*, 17 Kan. 189. Compare *Reock v. Newark*, 33 N. J. L. 129. Further, as to *local improvements*, see chap. xix.; *post*, sec. 810; *supra*, secs. 459, 467. In *Memphis v. Brown*, 20 Wall. 289 (1873), it was held that under its charter the city had full power to make paving contracts, and to pay either in cash or in bonds, or both, and to guarantee payment of the assessment bills against abutters. See also, *Saxton v. St. Joseph*, 60 Mo. 153 (1875). *Towers for electric lights* held not "local improvements," where the lighting system is not owned by the city. *Putnam v. Grand Rapids*, 58 Mich. 416.

<sup>2</sup> *New Albany v. Sweeney* (construing General Towns and Cities Act), 13 Ind. 245 (1859); *Lucas v. San Francisco*, 7 Cal. 463; *Lovell v. St. Paul*, 10 Minn. 290. Contracts with municipal corporations are construed with reference to the chartered or corporate powers of the city. 13 Ind. 245, *supra*.

If the municipal corporation agrees with the contractor to collect the assessments from the abutting owners, a failure to do so will render it liable. *Morgan v. Dubuque*, 28 Iowa, 575 (1870). See, however, *Beard v. Brooklyn*, 31 Barb. (N. Y.) 142; *Saxton v. St. Joseph*, 60 Mo. 153

§ 481 (401). **Contracts for Local or Public Improvements.**—A city charter required the *consent of a majority of property-owners* to make certain improvements, which, when made, were chargeable upon the *adjacent property*. An ordinance provided that contractors doing such work should look to the adjacent property, and not to the city, for their pay. Under these circumstances, the city entered into a contract with the plaintiff to grade a certain street, the plaintiff agreeing that he should receive his pay from the adjoining property. The plaintiff performed the work; and, inasmuch as the adjacent owners had never given their consent to the making of the improvement, he sued the city on the *contract*, to recover for the work done; and it was held that the action could not be maintained.<sup>1</sup>

(1873); *Saxton v. Beach*, 50 Mo. 488 (1872). A creditor of a municipality is not obliged to wait, before he sues, until the money can be collected from the land-owners benefited, and on whom the charter imposes the expense of the improvement whence his claim accrued. *Little v. Union Township Committee*, 40 N. J. L. 397.

<sup>1</sup> *Leavenworth v. Rankin*, 2 Kan. 357 (1864); *Swift v. Williamsburg*, 24 Barb. (N. Y.) 427; *Goodrich v. Detroit*, 12 Mich. 279; *Johnson v. Common Council*, 16 Ind. 227; *New Albany v. Sweeney*, 13 Ind. 245; *Moylan v. New Orleans*, 32 La. An. 673.

Where the *contractor has agreed to look for payment* to the lot benefited, or to the owner, he cannot hold the city, unless it may be in cases where the whole proceeding is void, or the city neglects its duty. *Kearney v. Covington*, 1 Met. (Ky.) 339. The subject is very fully discussed and the previous cases in the State commented on in *Craycraft v. Selva*, 10 Bush (Ky.), 696 (1874); *Casey v. Leavenworth*, 17 Kan. 189 (1876); *Memphis v. Brown* (an important case), 20 Wall. 289 (1873); *Smith v. Milwaukee*, 18 Wis. 63 (1864); *Finney v. Oshkosh*, *Id.* 220; *Chicago v. People*, 48 Ill. 416; *Ruppert v. Baltimore*, 23 Md. 184; *Louisville v. Henderson*, 5 Bush (Ky.), 515 (1869).

A city advertised for proposals to do certain public work, and the plaintiff made proposals, which were accepted, without qualification, by an entry on city records; and it was decided that the statement in

the published notice, "the expense of the work to be assessed," &c., was part of the contract, no other provision for payment having been made, and that the plaintiff could not maintain an action against the city until after the assessment and collection of his compensation, or until it or its officers failed to proceed with reasonable diligence, after the expense of the work was ascertained, to make and collect an assessment, and to pay over money thus collected. *Hunt v. Utica*, 18 N. Y. 442 (1858).

*Extent of recovery* by contractor against abutter where the work is done in a manner inferior to that stipulated for in the contract. *Creamer v. Bates*, 49 Mo. 523 (1872).

Further as to the *rights and remedies of the contractor*, of the property-owner, and the liabilities of the municipal corporation. *Memphis v. Brown*, 20 Wall. 289 (1874); *Smith v. Milwaukee*, 18 Wis. 63; *Foot v. Same*, *Id.* 270; *Bond v. Newark*, 19 N. J. Eq. 376; *Fletcher v. Oshkosh*, 18 Wis. 228, 232; *Palmer v. Stump*, 29 Ind. 329; *McSpedon v. New York*, 7 Bosw. (N. Y.) 601; *Reilly v. Philadelphia*, 60 Pa. St. 467; *Whalen v. La Crosse*, 16 Wis. 271; *Flournoy v. Jeffersonville*, 17 Ind. 169; *Creighton v. Toledo*, 18 Ohio St. 447; *Goodrich v. Detroit*, 12 Mich. 279; *Buffalo v. Holloway*, 7 N. Y. (3 Seld.) 493; *Storrs v. Utica*, 17 N. Y. 104; *Leavenworth v. Mills*, 6 Kan. 288 (1870); followed, *Leavenworth v. Stille*, 13 Kan. 539 (1874), and distinguished *Casey v. Leavenworth*, 17 Kan. 189 (1876); *Sleeper*

§ 482 (402). **Same subject.** — It has been several times decided that where the expense of making a local improvement is not to be raised by a general tax, but solely upon the property benefited, a *failure of the corporation*, though it is only the agent of the owners to be assessed, *to discharge its duty*, by making the necessary assessment, or its unreasonable delay in collecting and paying over the money, gives the contractor a right to recover his compensation in an action against the corporation. The cases on the point are conflicting.<sup>1</sup> The right to a general judgment should, in our opinion,

*v. Bullen*, 6 Kan. 300; *Lansing v. Van Gorder*, 24 Mich. 456 (1872); *post*, chapter on Taxation and Local Improvements; *supra*, sec. 460; *infra*, sec. 810; *Hendrick v. West Springfield*, 107 Mass. 541; *Mayer v. Mayor, &c. of New York*, 63 N. Y. 455 (1875); *Tone v. Mayor, &c. of New York*, 70 N. Y. 157 (1877). Assignment of contract. *McCubbin v. Atchison*, 12 Kan. 166; *McGlue v. Philadelphia*, 10 Phila. (Pa.) 348; *Perkinson v. St. Louis*, 4 Mo. App. 322. Where a contractor receives assessment bills in payment, with the right to use the name of the city in filing liens against the abutting owners, such owners may defend by questioning the character of the work though they are not nominal parties to the contract. *Erie City v. Butler*, 120 Pa. St. 374 (1888).

An ordinance of the city of Louisville ordained "that no contract should be binding on the city until it is approved by both boards of the general council, and this shall be necessary to make a contract complete and binding upon the city." A contract was made for a certain street improvement, which was signed by the mayor, but was never approved by both boards, but by one of them only. If the contract had been executed as required by the ordinance, the contractor would have been entitled to recover against the adjacent property-holders the agreed price. It was conceded that he could not recover against them, because the contract had not been thus executed. He thereupon sought to make the city liable for the work done; but the Court of Appeals, distinguishing the case from *Kearney v. Covington*, 1 Met. (Ky.) 345, held that no contract binding on the city was ever made, and that he could not recover, there having been no ratification of the contract. Mur-

phy *v. Louisville*, 9 Bush (Ky.), 189 (1872). *Quantum meruit* will not lie against a city for materials furnished for a public work under a contract which is void as not in conformity with statutes requiring such contracts to be made in a particular manner. *Bigler v. New York*, 5 Abb. (N. Y.) N. Cas. 51. When city not liable on contracts of police and school boards, see *Swift v. New York*, 17 Hun (N. Y.), 518; *Utica v. Miller*, 62 Ind. 230; *Jarvis v. Shelby*, 62 Ind. 257; *Crane v. Urbana*, 2 Ill. App. 559.

*As to implied municipal liability*, see the important opinion of the United States Supreme Court in Louisiana (*City of*) *v. Wood*, 102 U. S. 294; compare *Litchfield v. Ballou*, 114 U. S. 190. *Supra*, secs. 460, 461, and notes.

<sup>1</sup> *Beard v. Brooklyn*, 31 Barb. (N. Y.) 142 (1860). See *Goodrich v. Detroit*, 12 Mich. 279 (1864); *Cumming v. Mayor, &c. of Brooklyn*, 11 Paige (N. Y.) Ch. 596 (1845); *Baker v. Utica*, 19 N. Y. (5 Smith) 326 (1859); *Green v. Mayor, &c. of New York*, 5 Abb. Pr. (N. Y.) 503. See, generally, as to assessments for public works, *Doughty v. Hope*, 3 Denio (N. Y.) 249; *Manice v. New York*, 8 N. Y. 120; *People v. New York*, 5 Barb. (N. Y.) 43; 8 Barb. 95; 23 Barb. 390. Where the contractor agreed with the city to take his pay out of assessments when collected, but the city and its officers failed to exercise its duty and power to levy and collect the assessments, it was held that the city was liable to an action by the contractor for the damages for such neglect of duty, *i. e.*, the contract price, he having performed the contract on his part. *Reilly v. Albany*, 112 N. Y. 30 (1889), approving *Cumming v. Brooklyn, supra*; *Sage v. Brooklyn*, 89 N. Y. 189 (1882); *McCor-*

be limited, in any event, to cases where the corporation can afterwards reimburse itself by an assessment. For why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by *mandamus*, to compel the council to make the necessary assessment and proceed in the collection thereof with the requisite diligence? <sup>1</sup>

§ 483 (403). **Same subject. Corporate Control by Stipulation.** — An agreement by a contractor to execute a public improvement, *under the general direction and supervision* of a committee of a city, makes such committee — acting reasonably and honestly, not arbitrarily and capriciously — exclusively the judge, not only as to materials and manner, but also as to the time of doing the work.<sup>2</sup> But where

mack v. Brooklyn, 108 N. Y. 49; Galveston v. Heard, 54 Tex. 420. Where a city fails to levy a tax, or refuses to issue tax warrants in payment of a contract for grading and improving streets, and otherwise neglects to provide means, the city is liable, and the contractor may, in an action, recover the amount due. Atchison v. Byrnes, 22 Kan. 65; Craycraft v. Selvage, 10 Bush (Ky.), 696 (1874). In principle sustaining the view suggested in the text: Reock v. Newark, 33 N. J. L. 129; *post*, chap. xxiii., note. And see opinion of Field, C. J., in *Argenti v. San Francisco*, 16 Cal. 255, 282 (1860); *post*, chap. xx., on *Mandamus*. Where the city council can only legislate in conjunction with the mayor as part of the law-making power, if the council order local improvements by a resolution without the signature or concurrence of the mayor, and the work is done by a contractor under such authority, he cannot recover of the abutter (*Saxton v. Beach*, 50 Mo. 488, 1872), nor from the city, it seems, where the charter declares that the city shall in no manner be liable for local improvements. *Saxton v. St. Joseph*, 60 Mo. 153 (1875).

<sup>1</sup> Text approved. *Town of Tipton v. Jones*, 77 Ind. 307; see, however, *Reilly v. Albany*, *supra*.

<sup>2</sup> *Chapman v. Lowell*, 4 Cush. (Mass.) 378 (1849), relating to drains in the streets of the city. Certain wells were, by contract, to be constructed under the supervision and to the satisfaction of a specific city-officer; they were so constructed and

approved, and it was held that the city was concluded by the action of the officer. *Omaha v. Hammond*, 94 U. S. 98 (1876). As to *power of chancery to correct mistake* of the engineer or other person whose decision both parties to the contract have agreed to abide by, see *Railroad Co. v. Veeder*, 17 Ohio, 385. Where there is a condition precedent that contractor shall have certificate of performance by corporation. See *Bowery National Bank v. Mayor, &c. of New York*, 63 N. Y. 336 (1875); *Cameron, In re*, 50 N. Y. 502 (1872). Condition precedent that payment was not to be made to contractor until confirmation of the assessment, and whose duty to have confirmation made, construed. *Tone v. Mayor, &c.* 70 N. Y. 157 (1877). The contract between the contractor and the city provided that the contractor should be entitled to payment when the work was accepted by the Board of Public Works, and it was held that the contractor, who had, in fact, completed his work, might recover of the abutter, although a majority of the board refused or neglected to examine or accept the work. *Neenan v. Donoghue*, 50 Mo. 493 (1872). It is held that the acceptance by the city authorities of work done under a contract for a street improvement is only *prima facie* evidence that the work has been done in substantial compliance with the terms of the contract. *Gulick v. Connelly*, 42 Ind. 134 (1873); but see *Omaha v. Hammond*, *supra*.

a written contract has been entered into between a municipal corporation and a contractor, a general provision of an ordinance that the work shall be done under the directions of certain officers confers no authority upon them essentially to change or modify the provisions of the contract.<sup>1</sup> If, in a contract for a public work, the *corporation employer reserves the right to make alterations* in the form, dimensions, or materials of the work, the contractor is bound by any such alterations made in good faith; but such a clause does not authorize the employer to annul the agreement, or to stop the work in an unfinished state.<sup>2</sup>

§ 484 (404). **Evidences of Indebtedness; Negotiable Bonds.** — We have elsewhere discussed the power of the legislature to authorize the issue of municipal bonds in aid of railway and other like enterprises,<sup>3</sup> and have also considered the express and implied power of municipal corporations to borrow money and issue obligations therefor.<sup>4</sup> It appropriately belongs to this place, however, to notice more at length the *different kinds of corporate evidences of debt*, and the rights and remedies of the holders thereof, and to this general subject will the remainder of the present chapter be devoted.

§ 485. **Two Great Classes of Municipal Securities: 1. Ordinary Warrants; 2. Negotiable Bonds; Form, Execution, and Attributes of each.** — It is material to bear in mind the *different kinds* of corporate evidences of debt. These are of two general classes. *FIRST, there is the usual municipal or county warrant or order.* These are commonly drawn by one or more of the officers upon the treasurer, directing him to pay to the person named, or *bearer*, a given sum of

<sup>1</sup> *Bonesteel v. Mayor, &c. of New York*, 22 N. Y. 162 (1860); *Bond v. Newark*, 4 C. E. Green (19 N. J. Eq.), 376; compare *Omaha v. Hammond*, 94 U. S. 98 (1876). But the authority of the corporation may be implied from its having by its own act rendered extra materials necessary to conform the work to the conditions of the contract. *Messenger v. Buffalo*, 21 N. Y. 196 (1860); see, also, *Stuart v. Cambridge*, 125 Mass. 102. Effect of certificate of approval of a city officer where, by the contract, the work is to be done to his approval. *Bond v. Newark*, 4 C. E. Green (19 N. J. Eq.), 376.

As to reserved right to *discontinue work* and annul contract. *Bietry v. New Orleans*, 24 La. An. 21 (1872).

<sup>2</sup> *Clark v. Mayor, &c. of New York*, 4

*Comst. (N. Y.)* 338 (1850). Remedy of contractor, and measure of damages in such a case, considered. *Ib.* It is held, in *Vermont*, that a person who has contracted with the proper town officers to build a road cannot proceed with his contract after notice of an appeal, and recover of a town therefor. This decision is based upon a construction of the statute of that State by which the appeal is intended to stay or suspend all proceedings toward building the road, and the contractor was bound to take his contract subject to the contingency of the appeal allowed by law. *Taft v. Pittsford*, 28 Vt. 286 (1856).

<sup>3</sup> *Ante*, sec. 119 *et seq.*, and see *post*, sec. 511 *et seq.*

<sup>4</sup> *Ante*, sec. 117 *et seq.*; *supra*, sec. 470, note.

money. The power to issue them, and the mode in which it is to be exercised, are usually prescribed by charter or statute. They are vouchers or "necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes,"<sup>1</sup> out of which they must be paid. The power to issue such warrants or orders may, where not expressly conferred or denied, be *implied* as incidental to carrying out the objects of a municipal or public corporation. SECOND, *there is the municipal bond, negotiable in form, payable at a future day, intended for sale in the market, issued under express authority of the legislature.*<sup>2</sup>

§ 486. **Municipal Bonds.** — Such bonds, negotiable in form, notwithstanding they are under seal, are clothed with all the attributes of commercial paper, pass by delivery or indorsement, and are not subject to equities (where the *power* to issue them exists) in the hands of holders for value before due, without notice. Such bonds usually have coupons attached, which partake of the nature of the bond, are likewise negotiable, may be detached and held separately from the bond, and the holder may sue thereon in his own name, without producing or being interested in the bonds to which they were originally attached. Such securities are made to raise money by their sale, and this object would be defeated if they were subject to equities (where the power to issue exists) in the hands of *bona fide* holders. The propositions in this section of the text are so well settled as to be no longer open to question.<sup>3</sup>

<sup>1</sup> *Per Bradley, J.*, in *Nashville v. Ray*, 19 Wall. 468, 477 (1873).

<sup>2</sup> The legislature may confer upon municipal bonds all the characteristics of commercial paper, such as negotiability and protection in the hands of innocent holders for value. *Alvord v. Syracuse Savings Bank*, 98 N. Y. 599.

<sup>3</sup> *Mercer County v. Hackett*, 1 Wall. 83 (1863), denying *Diamond v. Lawrence County*, 37 Pa. St. 353; *Meyer v. Muscatine*, 1 Wall. 384; *Gelpecke v. Dubuque*, *Id.* 175; *Moran v. Miami County*, 2 Black, 732 (1862); *Clapp v. Cedar County*, 5 Iowa, 15; *Morris Canal Co. v. Fisher*, 1 Stockt. Ch. (N. J.) 667 (1855); *Craig v. Vicksburg*, 31 Miss. 216; *Jackson v. Railroad Co.*, 48 Me. 147; s. c. 2 Am. Law Reg. (N. s.) 585; s. c. *Id.* 748, and note of Judge *Redfield*; *Chapin v. Railroad Co.*, 8 Gray (Mass.), 575; *Lynde v. Winnebago County* (Iowa court-house

bonds), 16 Wall. 6 (1872); *Gould v. Sterling*, 23 N. Y. 464; s. c. 1 Am. Law Reg. (N. s.) 290, and note; *Clark v. Des Moines*, 19 Iowa, 199, 213 (1865), and cases cited; *White v. Railroad Co.*, 21 How. 575; *Bank v. Railroad Co.*, 3 Kern. (13 N. Y.) 599; s. c. 4 Duer, 480; *Bank v. Rome*, 19 N. Y. 20; *Aurora v. West*, 22 Ind. 88; *Comm'rs v. Bright*, 18 Ind. 93; *Barrett v. Schuyler County*, 44 Mo. 197; *DeVoss v. Richmond*, 18 Gratt. 338; s. c. 7 Am. Law Reg. (N. s.) 589; *Lynchburg v. Slaughter*, 75 Va. 57; *Durant v. Iowa County*, *Woolworth C. C. R.* 69; *State v. Madison*, 7 Wis. 688; *Clark v. Janesville*, 10 Wis. 136 (1859); *Maddox v. Graham*, 2 Met. (Ky.) 56 (1859); *Kerr v. Corry*, 105 Pa. St. 282; *Ackley School District v. Hall*, 113 U. S. 135; *New Providence v. Halsey*, 117 U. S. 336; *Oubre v. Donaldsonville*, 33 La. An. 386; *Martin v. Police Jury*, 32 La. An. 1022.



§ 487 (406). **Ordinary Corporation Orders or Warrants.** — But *ordinary city, county, and town orders or warrants* are in some respects *different from bonds* of the character just mentioned, and, in the author's judgment, the better opinion, as well as decided weight of authority, is that there is *no implied power* in the officers of a town, county, or city corporation to issue warrants or orders which shall be free from equities in the hands of holders; that the existence of such a power is not necessary as an incident to powers ordinarily granted, or to carry out the purposes of the corporation, and would be attended with abuse and fraught with danger. Ordinary warrants or orders, negotiable in form, may be made by the proper officers; and in many of the States such instruments may be

Municipal bonds payable to bearer are negotiable by delivery. *Gardner v. Haney*, 86 Ind. 17; *Farr v. Lyons*, 13 Fed. Rep. 377. *Post*, sec. 513.

**COUPONS.** *Coupons* attached to such bonds are negotiable, and the holder may sue thereon in his own name without being interested in or producing the bonds to which they were originally attached. *Thomson v. Lee County*, 3 Wall. 327 (1865); *Murray v. Lardner*, 2 Wall. 110 (1864); *Knox County v. Aspinwall*, 21 How. 539 (1858); *Johnson v. Stark County*, 24 Ill. 75; *Kenosha v. Lamson*, 9 Wall. 478 (1869); *Chicago, B. & Q. R. Co. v. Otoe County*, 1 Dillon C. C. R. 338. *Form of coupons, &c., post*, sec. 512, note. Judgment in suit on coupons or for interest, when a bar to subsequent suit. *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. An. 294; *Beloit v. Morgan*, 7 Wall. 619; *Bissell v. Spring Valley Township*, 124 U. S. 225; compare *Cromwell v. Sac County*, 96 U. S. 51.

An action on a coupon is *not barred* in less time than the bond to which it was originally attached. *Kenosha v. Lamson*, *supra*; *Lexington v. Butler*, 14 Wall. 282 (1871). Explained, *Clark v. Iowa City*, 20 Wall. 583 (1874). *How declared on*. *Ring v. County*, 6 Iowa, 265; *Railroad Co. v. Otoe County*, *supra*; *Wiley v. Board, &c.*, 11 Minn. 371. The better practice, in the author's judgment, is to set out in the declaration the bond to which the coupon in suit was attached, or to allege its legal effect and recitals.

Municipal corporations may plead the *statute of limitations* in actions against

them on their bonds payable at a fixed time. *De Cordova v. Galveston*, 4 Tex. 470 (1849); see *Underhill v. Sonora Trs.*, 17 Cal. 172; *Baker v. Johnson Co.*, 33 Iowa, 151; *post*, sec. 668 *et seq.*

The *statute of limitations* commences to run on coupons detached from the bonds and negotiated separately, from the time the coupons mature, and the operation of the statute, in such a case, is not deferred until the maturity of the bonds to which the coupons belonged. This point has been expressly adjudged by the Supreme Court in *Clark v. Iowa City*, 20 Wall. 583 (1874), and the prior decisions, which had been supposed to hold otherwise, explained to mean only that when the bonds were specialties, the coupons, though detached, partook of the same nature, and therefore the same statute of limitations applied to both the coupons and the bonds; that is, if the bonds were specialties, so were the coupons, and the statute of limitations as to sealed instruments, and not the more restricted statute applicable to simple contracts, applied. *Kenosha v. Lamson*, 9 Wall. 477; *Lexington v. Butler*, 14 Wall. 282. The statute also begins to run on coupons from the time they respectively mature, *although they remain attached to the bond* which represents the principal debt. *Amy v. Dubuque*, 98 U. S. 470; *Nash v. Eldorado Co.*, 24 Fed. Rep. 252. As to negotiability of coupons which are due detached from bonds not due. *Thompson v. Perrine*, 106 U. S. 589. Payment of bonds does not extinguish detached coupons not paid. *Bank v. Hartford, &c. R. R. Co.*, 8 R. I. 375.

transferred by delivery or indorsement, and the holder sue thereon in his own name; yet they are not commercial or negotiable paper in the hands of holders, so as to exclude inquiry into the legality of their issue, or to preclude defences thereto.<sup>1</sup> Ordinary warrants drawn by one officer on another officer of the same corporation are not bills of exchange, as such bills involve the idea of two parties; but are orders by the corporation on itself,—mere directions to the treasurer to pay the amount to the bearer.<sup>2</sup>

<sup>1</sup> *Emery v. Mariaville*, 56 Me. 315; *Shirk v. Pulaski Co.*, 4 Dillon, 209, 213 (1877), and cases cited; *Clark v. Des Moines*, 19 Iowa, 199, 211–214 (1865), and cases cited; *Clark v. Polk County*, *Id.* 248; *Mathes v. Cameron*, 62 Mo. 504 (1876); *People v. County*, 11 Cal. 170 (1858); *Sturtevant v. Liberty*, 46 Me. 457; *Smith v. Cheshire*, 13 Gray (Mass.), 318 (1859); *Andover v. Grafton*, 7 N. H. 298 (1834); compare, however, *Bank v. Farmington*, 41 N. H. 32; *Dalrymple v. Whittingham*, 26 Vt. 345; *Inhabitants v. Weir*, 9 Ind. 224 (1857); *Connorsville v. Connorsville Hydraulic Co.*, 86 Ind. 184; *School District v. Thompson*, 5 Minn. 280 (1861); *s. p. Goodnow v. Commissioners*, 11 *Id.* 31 (1865); *Hyde v. Franklin*, 27 Vt. 185 (1855); approved, *Taft v. Pittsford*, 28 Vt. 286; *Halstead v. Mayor*, 3 Comst. (3 N. Y.) 430; *s. c.* 5 Barb. 218; *The Floyd Acceptances*, 7 Wall. 666, and reasoning of Mr. Justice *Miller*; *People v. Gray*, 23 Cal. 125; *Id.* 447; *Hubbard v. Lyndon*, 28 Wis. 674 (1871). Warrants, duly signed and sealed, are *prima facie* valid, but open to defences. *Commissioners v. Keller*, 6 Kan. 510; *Commissioners v. Day*, 19 Ind. 540 (1862); *People v. Johnson*, 100 Ill. 537; *infra*, sec. 502.

*Transferee or holder may sue in his own name.* *Emery v. Mariaville*, 56 Me. 315; *Crawford County v. Wilson*, 2 Eng. (7 Ark.) 214; *Clark v. Des Moines*, 19 Iowa, 199; *Campbell v. Polk County*, 3 Iowa, 467; *Clark v. Polk County*, 19 Iowa, 248; *Int. Bank v. Franklin Co.*, 65 Mo. 105 (1877). Otherwise in *Massachusetts*. *Smith v. Cheshire*, 13 Gray (Mass.), 318, treating a town order, payable to bearer, as a mere *chose in action*, which could not be enforced in the name of an assignee. *s. p. O'Donnell v. City*, 7 Phil. (Pa.) 234. In many of the States, "the real party in

interest" may sue in his own name. In *Vermont*, as to right of holder of town and county orders to sue in his own name, see *Dalrymple v. Whittingham*, 26 Vt. 345; compare *Taft v. Pittsford*, 28 Vt. 286, 289; *Hyde v. Franklin*, 27 Vt. 185. *Right of indorsee to sue or enforce by mandamus in his own name.* *Kelly v. Mayor, &c.*, 4 Hill (N. Y.), 263; *Clark v. School District*, 3 R. I. 199; *Moss v. Oakley*, 2 Hill (N. Y.), 265; *Commissioners v. Day*, 19 Ind. 450; *Dively v. Cedar Falls*, 21 Iowa, 565; *Justices v. Orr*, 12 Ga. 137. Statutory form of assignment must be observed. *Int. Bank v. Franklin Co.*, 65 Mo. 105 (1877); *post*, chap. xx. sec. 849.

<sup>2</sup> *Miller v. Thompson*, 3 Man. & Gr. 576; *Fairchild v. Ogdensburg, C. & R. Co.*, 15 N. Y. 337; *Bull v. Sims*, 23 N. Y. 570, 572; *Clark v. Polk County*, 19 Iowa, 247; *Hasey v. White Pigeon Beet Sugar Co.*, 1 Doug. (Mich.) 193; *Dana v. San Francisco*, 19 Cal. 486; *Bibb County Inf. C. Justices v. Orr*, 12 Ga. 137. Municipal certificates of indebtedness are not "*bills of credit*" within the meaning of the prohibition (art. 1, sec. 10) of the National Constitution (*Baltimore v. Board of Police*, 15 Md. 376, 1859), and possess no elements of commercial paper. *Chandler v. Bay St. Louis*, 57 Miss. 327. As a *county warrant* is an instrument by which the money, property, or rights of a county may be affected, it is such an one as *may be forged*. *State v. Fenley*, 18 Mo. 445 (1853). Requisites of indictment in such a case. *Id.* Without the sanction of the county board the clerk has no authority to issue, or the treasurer to pay or countersign, any warrant. *People v. Klopke*, 92 Ill. 134.

Bonds issued by the city of Little Rock on bank-note paper, engraved with vignettes, in the similitude of bank-bills, in-

§ 488 (407). **Power to make and issue Negotiable Paper.** — *Banking and trading corporations* have implied or incidental power to make *negotiable paper*; <sup>1</sup> and the same rule has, in some cases, been applied to municipal corporations. The ordinary warrants of such corporations, it is clear, do not cut off equities, and it is doubtful whether they have an *incidental power* to make paper which shall have this effect.<sup>2</sup> The subject has been discussed in a previous chapter.<sup>3</sup>

tended to circulate as money, were held to be illegal and void under the legislation of *Arkansas*, both by the State and Federal courts. *Lindsey v. Rottaken*, 32 Ark. 619 (1878); *Jones v. Little Rock*, 25 Ark. 301 (1868); *Merchants' Nat. Bank v. Little Rock*, 5 Dillon, 299 (1878); s. c. 98 U. S. 308. In the last-named case it was decided that this illegal money having been paid out by the city to *bona fide* creditors for valid claims, and the city having afterwards called it in, and by the action of the municipal council acknowledged an indebtedness for the amount to the holders and promised to pay the same, it was liable on such acknowledgment and new promise. In *Jones v. Little Rock*, *supra*, the court refused to interfere by injunction at the instance of a taxpayer to prevent that city from issuing paper of this character.

*Liability as respects scrip issued to circulate as money.* *Thomas v. Richmond*, 12 Wall. 349 (1870), and in which the city was held not to be liable. See on this subject, *supra*, sec. 443, note, sec. 448, and, also, *Alleghany City v. McClurkan*, 14 Pa. St. 81 (1850); *Jones v. Little Rock*, 25 Ark. 301; *Miller v. Lynchburg*, 20 Gratt. (Va.) 330 (1871); *Smith v. New*

*Orleans*, 23 La. An. 5 (1871); *Clark v. Des Moines*, 19 Iowa, 199 (1865); *Dively v. Cedar Falls*, 21 Iowa, 565; s. c. 27 Iowa, 227; *Black v. Cohen*, 52 Ga. 621 (1874); *Cheaney v. Brookfield*, 60 Mo. 53 (1874); *Hackettstown ads. Swackhamer*, 37 N. J. L. 191 (1874); *Lucas v. Pitney*, 3 Dutch. (N. J.) 221.

<sup>1</sup> *McCullough v. Moss*, 5 Denio (N. Y.), 567; *Straus v. Eagle Insurance Co.*, 5 Ohio St. 59; *Mott v. Hicks*, 1 Cow. (N. Y.) 513; *Attorney-General v. L. & F. Ins. Co.*, 9 Paige (N. Y.), Ch. 470; 2 Kent Com. 299; 1 *Parsons N. & B.* 165; *Clark v. Des Moines*, 19 Iowa, 212; *ante*, secs. 117, 118; *Lucas v. Pitney*, 3 Dutch. (N. J.) 221. *Morawetz on Corp.* (2d ed.) secs. 350-352. *Post*, sec. 507.

<sup>2</sup> *Kelley v. Brooklyn*, 4 Hill (N. Y.), 263; *Clark v. Des Moines*, 19 Iowa, 199 213; *Came v. Brigham*, 39 Me. 39; *Clarke v. School District*, 3 R. I. 199; *Goodnow v. Remsey Co. Comm'rs*, 11 Minn. 31; *Burton v. Harvey Co. Savings Bank*, 28 Kan. 390; *Carleton v. Washington*, 38 Kan. 726; *Little Rock v. Merchants' Nat. Bank*, 98 U. S. 308, citing and approving text; *ante*, secs. 117-127. In *Indiana* the common-law doctrine that a corporation could not make a

<sup>3</sup> The author's views are expressed and the cases on the subject are referred to, *ante*, sec. 117 *et seq.*, and are approved in *Parsons v. Monmouth*, 70 Me. 262 (1879).

*Statutory power "to issue county orders"* gives no authority to issue negotiable bonds payable at a future day, with interest coupons attached. The difference is substantial. *Goodnow v. Comm'rs*, 11 Minn. 31 (1865). *County Comm'rs v. Carter*, 2 Kan. 115 (1860); *Hull v. County*, 12 Iowa, 142. *Statutory form of county warrants held to be directory*, and a mere

departure from this form is no defence to an action on the warrant. *Young v. Camden County*, 19 Mo. 309 (1854). A contract made by a county with another party, in which the county agrees to pay for services rendered, in county warrants, is in effect a contract payable in money, and is not void. *Babcock v. Goodrich*, 47 Cal. 488 (1874).

Express authority to a city to subscribe for stock, to be paid for by "*certificates of loan*," authorizes it to issue negotiable bonds with coupons attached, such "*cer-*

§§ 489-499 (408). **Liability of Indorser of Warrants.** — Warrants or orders of a municipal corporation for the unconditional payment

promissory note is exploded, and corporations can now make contracts *intra vires* in writing not under seal. Municipal and *quasi* corporations can make in a proper case a promissory note (citing *Ketchum v. Buffalo*, 14 N. Y. 356; *Railroad Co. v. Evansville*, 15 Ind. 395); a promissory note of a school township in payment for building a school-house held valid. *Sheffield School Tp. v. Andress*, 56 Ind. 157 (1877). See *Douglass v. Virginia City*, 5 Nevada R., 147 (1869), as to power to make notes unless specially restricted. Power to fund debts and to issue new bonds, notes, or evidences of indebtedness. *Galena v. Corwith*, 48 Ill. 423. An action cannot be maintained against a city on a

demand payable out of a fund over which its charter gives a board of education control to the exclusion of the municipal officers. *Crane v. Urbana*, 2 Ill. App. 559. That public corporations have no authority to make and place in market commercial paper without express power. See *Hewitt v. School Dist.*, 94 Ill. 528; *Supervisors v. Farwell*, 25 Ill. 181; *Clark v. Hancock Co.*, 27 Ill. 305; *Marshall Co. v. Cook*, 38 Ill. 44; *Wiley v. Silliman*, 62 Ill. 170; *Harding v. Railroad Co.*, 65 Ill. 90; *McWhorter v. People*, 65 Ill. 290; *Big Grove v. Wells*, 65 Ill. 263; *Williamsport v. Commonwealth*, 84 Pa. St. 487 (1877), quoted *ante*, secs. 120, 121. *Ante*, secs. 117-125. *Post*, sec. 507, 507 a.

tificates of loan" and "bonds" being considered identical. *Amey v. Allegheny City*, 24 How. (U. S.) 364 (1860); see *Commonwealth v. Pittsburgh* (power "to borrow money"), 34 Pa. St. 496, 511; *Same v. Same*, 41 Pa. St. 278. Power by public corporations to issue negotiable bonds may be inferred from the power to subscribe for stock in railroad companies and to make payment for it in bonds. *Curtis v. Butler County*, 24 How. (U. S.) 435; *Bushnell v. Beloit*, 10 Wis. 195. Express legislative authority to a city to subscribe for stock in a railroad "as fully as any individual," authorizes the issue by the city of negotiable bonds in payment therefor. *Seybert v. Pittsburgh*, 1 Wall. (U. S.) 272 (1863); approving *Commonwealth v. Same*, 41 Pa. St. 278; *Rogers v. Burlington* (power to "borrow money for any public purpose"), 3 Wall. 654 (1865); *Meyer v. Muscatine*, 1 Wall. 385; *Mitchell v. Burlington*, 4 Wall. 270. By resolution, the council authorized the mayor to borrow money of a bank, and execute the note of the corporation therefor, instead of which he executed the bond of the corporation under the seal of the corporation. In an action on this bond by the payee, it was held that the corporation could plead *non est factum*, since the act of the mayor in executing a writing obligatory instead of a note did not bind the corporation.

*Little Rock v. State Bank*, 3 Eng. (8 Ark.) 227; see *Damon v. Granby*, 2 Pick. (Mass.) 345; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; *Bank v. Patterson*, 7 Cranch, 299; *Head v. Prov. Ins. Co.*, 2 Cranch, 127. Where towns were required "to purchase" liquors, and the selectmen were indictable if they failed to make provision for executing the law, it was held that a town might give a negotiable note for liquors actually purchased, and that the town could not defend against it in the hands of a *bona fide* holder, on the ground that the liquors were sold in violation of the law of the State. *Great Falls Bank v. Farmington*, 41 N. H. 32 (1860). What an indorsee is bound to inquire about, stated. *Ib.* 42.

The general doctrines of the text in sections 485-488 are coincident with the views of the United States Supreme Court in the case of the *Police Jury v. Britton*, 15 Wall. 566 (1872), where it was held that county officers in *Louisiana*, with the usual powers of such officers, have no implied authority to issue negotiable paper (bonds with coupons), payable in the future, to raise money or to fund an existing debt, which will cut off equities in the hands of *bona fide* holders. Such a power is not necessarily incident to the power to make specified expenditures or improvements, though it may be implied from certain

of money to a person named, or order, or to bearer, have the character of negotiable paper, so far, at least, as to render parties indorsing them *liable as indorsers*.<sup>1</sup>

§ 500 (409). **Payment and Cancellation of Warrants.** — Payment by the treasurer or proper officer of a municipal corporation of its orders or warrants *ipso facto extinguishes* them. If lent, reissued, or put into circulation again by the officer, after he had once obtained credit therefor, they are not valid securities, not even, it seems, in the hands of an innocent holder.<sup>2</sup>

§ 501 (410). **Rights and Remedies of Holder of Warrants.** — A creditor of a town is not *bound to receive an order* on the treasurer, but may sue upon his original cause of action.<sup>3</sup> But if he

express powers, as, for example, the power to borrow money. After stating other instances in which the power has been implied, Mr. Justice *Bradley*, observes : "But in our judgment these implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case. It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities." 15 Wall. 572. But see, on this point of the incidental power of municipal corporations to borrow money, and to issue commercial paper, the later case of Mayor of Nashville *v. Ray*, 19 Wall. 468 (1873); *ante*, sec. 117 *et seq.*, and notes; *Sterling v. West Feliciana*, 26 La. An. 59 (1874). *Post*, secs. 507, 507 *a*.

<sup>1</sup> Bull *v. Sims*, 23 N. Y. 570 (1861). In this case the action was by an indorsee against the defendant as indorser of the following instrument :—

MILWAUKEE, Aug. 1, 1859.

The treasurer will, on or before the 1st day of February next, pay to the order of E. Sims, fifty dollars, *out of any funds belonging to the city not before specially appropriated*, the same having been this day allowed for dredging, and chargeable to the general city fund.

H. L. PAGE, Mayor.

R. R. LYNCH, Clerk.

It was held that the defendant incurred the responsibility of an indorser of negotiable paper, and that the plaintiff was not bound to show the existence of funds in the city treasury sufficient to pay the warrants, and not specially appropriated at the time of its maturity. *Campbell v. Polk County*, 3 Iowa, 467; *Hodges v. Shuler*, 22 N. Y. 114; *Fairchild v. Ogdensburgh, &c. Railroad Co.*, 15 N. Y. 337. Compare as to liability of indorser, *Keller v. Hicks*, 22 Cal. 457.

<sup>2</sup> *Canal Bank v. Supervisors*, 5 Denio (N. Y.), 517 (1848). In this case it was held that where, without any fraudulent intent, the holder of valid county orders exchanged them with the treasurer for others which were in fact paid, but which had never been allowed him in his accounts, the debt represented by the valid orders was not extinguished, and was a sufficient consideration to support a settlement with the county allowing it. As to illegal orders in hands of *bona fide* holder. *Halstead v. The Mayor, &c. of New York*, 3 Comst. (N. Y.) 430, affirming s. c. 5 Barb. 218; *Mayor of Nashville v. Ray* (important case), 19 Wall. 468 (1873). A municipal corporation is not liable for the increased face value of warrants which the clerk has fraudulently raised after issuance. *Chandler v. Bay St. Louis*, 57 Mich. 327. Payment to bearer in good faith exonerates the corporation. *Sweet v. Carver Co.*, 16 Minn. 106 (1871).

<sup>3</sup> *Benson v. Carmel*, 8 Greenl. (8 Me.)

does receive such an order he is charged with the duty of presenting it to the treasurer upon whom it is drawn, or of alleging facts which excuse presentment, before he can maintain an action upon it. As such an instrument is, in effect, an order by the debtor on himself, if presented and payment be refused, the town is liable instantly, and without notice of non-payment.<sup>1</sup>

§ 502 (411). **Presumption of Liability.** — *County and city orders signed by the proper officers are prima facie binding and legal.* These officers will be presumed to have done their duty. Such orders make a *prima facie* cause of action. Impeachment must come from the defendant.<sup>2</sup>

§ 503. **Warrants not Negotiable Paper.** — Such warrants or orders drawn for ordinary municipal expenses *are not intended to have the*

112; Willey v. Greenfield, 30 Me. 452 (1849). No misapplication of a special fund by the officers of a municipal corporation can defeat the rights of creditors entitled to be paid therefrom. State v. Pillsbury, 30 La. An. 705.

<sup>1</sup> Varner v. Nobleborough, 2 Greenl. (2 Me.) 121, where Mellen, C. J., says: "No sound reason can be given why a town should be subjected to the perplexity of costs of an action before the payee of an order will do his duty and request the payment. . . . There is an implied engagement to conform to established usage, and present the order for payment." Benson v. Carmel, *supra*; Pease v. Cornish, 19 Me. (1 Appl.) 191 (1841). An action cannot be maintained on warrants drawn on a municipal treasurer, without allegation and proof of their presentation to him, or of facts which will excuse the presentation. Central v. Wilcoxen, 3 Col. 566; East Union v. Ryan, 86 Pa. St. 459. As to mode of presentment. Steel v. Davis County, 2 G. Greene (Iowa), 469; Campbell v. Polk County, 3 Iowa, 467. Where the payee has accepted county orders for a debt against the county, and has parted with such orders, he cannot sue the county for the original debt. Crawford County v. Wilson, 2 Eng. (7 Ark.) 214 (1846). See Allison v. Juniata County, 50 Pa. St. 351. An unpaid and dishonored warrant on the corporation treasurer is not, *prima facie* at least, an

extinguishment or novation of the original debt. Goldschmidt v. New Orleans, 5 La. An. 436; Short v. New Orleans, 4 La. An. 281.

<sup>2</sup> Floyd Co. Comm'rs v. Day, 19 Ind. 450 (1862); Hamilton v. Newcastle & D. R. Co., 9 Ind. 359; Leavenworth County Comm'rs v. Keller, 6 Kan. 510 (1870); Clark v. Des Moines, 19 Iowa, 211 (1865); Cheeney v. Brookfield, 60 Mo. 53 (1875); Connersville v. Connersville Hydraulic Co., 86 Ind. 184. Such debts "do not stand on the footing of those contracted under a special *conditional grant of power*." Comm'rs v. Day, *supra*; People v. Mead, 24 N. Y. 114; *ante*, chap. ix. sec. 213; *supra*, sec. 487. County warrants are valid instruments only when the board of supervisors had legal authority to issue them, or to contract the obligation on which they were founded, and are not binding when issued in violation of law or in fulfilment of a contract that the board was prohibited from making. See cases, *supra*, in this note; Sault Ste. Marie v. Van Dusan, 40 Mich. 429; Jefferson County v. Arrighi, 54 Miss. 668; Nash v. St. Paul, 11 Minn. 174; People v. Flag, 17 N. Y. 589; Brady v. New York, 20 N. Y. 312; Hague v. Philadelphia, 48 Pa. 528. A law creating the liability of a county is a condition precedent to the exaction of payment from the county. Hess v. Pegg, 7 Nev. 23 (1871).

qualities of commercial paper, but are instruments authorized for convenient use in conducting the current and ordinary business of the corporation and as a means of anticipating its ordinary revenue. It would overwhelm municipalities with ruin to hold that such warrants or orders have the qualities of negotiable paper, especially that quality which protects an innocent holder for value from defences<sup>1</sup> of which he has no notice, actual or constructive. All holders of such warrants or orders, even when payable to order or bearer, stand in the shoes of the payee, and their rights and remedies are often essentially different from those of the holders of authorized negotiable municipal bonds. Such is the sound doctrine, and such is the doctrine of the authorities almost without exception.<sup>1</sup>

Without express authority from the legislature a *municipality cannot discount its warrants* to its creditors so as to make them equivalent to cash, or issue warrants for more than the sum actually due the claimant; and as to the excess they are void, and the holder will be treated only as the equitable assignee of the valid legal claim of the payee.<sup>2</sup>

§ 504 (412). **Defences.**—A municipal corporation is *not estopped*, after a warrant upon its treasury has been issued, to set up the defence of *ultra vires*, or *fraud*, or *want or failure of consideration*.<sup>3</sup> And it may maintain a *bill in equity* to cancel warrants illegally

<sup>1</sup> Carroll Co. Sup. v. U. S. (nature of warrants and remedy), 18 Wall. 71; Shirk v. Pulaski County, 4 Dillon, 209, 213 (1877), and cases cited; Clark v. Des Moines, 19 Iowa, 199; Mayor of Nashville v. Ray, 19 Wall. 468; United States v. Miller County, 4 Dillon, 233 (1878).

<sup>2</sup> Shirk v. Pulaski County, 4 Dillon, 209 (1877); Goynes v. Ashley County, 31 Ark. 552 (1876); Bauer v. Franklin County, 51 Mo. 205 (1873). "The flagrant abuses," which, as *Wagner, J.*, says, in the case last cited, would follow any other doctrine, are well exemplified in Shirk v. Pulaski County. Foster v. Coleman, 10 Cal. 278; Clark v. Des Moines, 19 Iowa, 199.

<sup>3</sup> Thomas v. Richmond (scrip to circulate as money), 12 Wall. 349 (1870); Webster County v. Taylor, 19 Iowa, 117 (1865); Clark v. Des Moines, *Id.* 199; Clark v. Polk County, *Id.* 248; Hodges v. Buffalo, 2 Denio (N. Y.), 110; Halstead v. New

York, 3 N. Y. 430; Brown v. Utica, 2 Barb. (N. Y.) 104; Anthony v. Adams, 1 Met. (Mass.) 286. The allowance of a claim by a county board is not final and conclusive. Such allowance is *prima facie* evidence of the correctness of the claim; "but," says *Kingman, C. J.*, "the settlement of an account by the county board is not more sacred than a settlement made by individuals." The court therefore held, and properly so, that the allowance of a claim by the county was not an *adjudication* in the sense that it would conclude the county as to the amount allowed when sued upon the warrant drawn in pursuance of such allowance. Comm'r's v. Keller, 6 Kan. 510; Nashville v. Ray, 19 Wall. 468 (1873); Shirk v. Pulaski County, 4 Dillon, 209 (1877); Cheeney v. Brookfield, 60 Mo. 53 (1875); *post*, chap. xxiii. Warrants may, it seems, be *usurious*. Clark v. Des Moines, *supra*; *post*, sec. 506, note.

issued.<sup>1</sup> Taxpayers may enjoin the issue of illegal warrants or scrip.<sup>2</sup>

§ 505 (413). **Payable out of a Particular Fund.** — If by law a particular claim *is to be paid out of a special fund*, a warrant or order issued therefor should be made payable out of such fund; if made payable from the treasury generally by the officers issuing it, the corporation is not bound by their act.<sup>3</sup> An order or warrant, concluding with the words “and charge the same to the account of Union Avenue,” is payable out of the particular fund indicated, and is not a claim against the corporation.<sup>4</sup> But the distinction must be observed between orders payable out of a particular fund, and those which evidence a general corporate liability, but are directed to be charged to a particular account.<sup>5</sup>

<sup>1</sup> Pulaski County v. Lincoln, 4 Eng. (9 Ark.) 320 (1849); Webster County v. Taylor, 19 Iowa, 117; Paris Tp. Trs. v. Cherry, 8 Ohio St. 564 (1858); Glastenbury v. McDonald, 44 Vt. 450 (1872). In *Mississippi* a board known as the board of police are authorized by law to audit and allow, upon due proof, all claims against the county; and counties in that State cannot be sued directly. The action of the board in allowing claims for matters of county charge, and in ordering warrants to issue therefor, is final and conclusive on the county, in the absence of fraud, until it is reversed or vacated. Carroll v. Board, &c., 28 Miss. (6 Cush.) 38 (1854). But the weight of authority is otherwise. Shirk v. Pulaski County, 4 Dillon, 209 (1877). *Effect of issuing new orders for old.* See Clark v. Des Moines, 19 Iowa, 199; Chemung Canal Bank v. Chemung Co. Sup., 5 Denio (N. Y.), 517; Lake v. Trustees, 4 Denio (N. Y.), 520; Shirk v. Pulaski County, 4 Dillon, 209 (1877). On warrants or orders the *statute of limitations* does not begin to run until payment is denied. Justices of Bibb Co. Inferior Court v. Orr, 12 Ga. 137 (1852). See Carroll v. Tishamingo County Board of Police, 28 Miss. 38; De Cordova v. Galveston (bonds), 4 Tex. 470; Kenosha v. Lamson (coupons), 9 Wall. 478; *supra*, sec. 487, note; Baker v. Johnson County, 33 Iowa, 151. In *Nebraska*, county warrants are not within the limitation statutes. Brewer v. Otoe County, 1 Neb. 373.

<sup>2</sup> Colburn v. Chattanooga, Tenn.; s. c.

17 Am. Law Reg. n. s. 191; *post*, secs. 914, 921, 923.

<sup>3</sup> Tippecanoe Co. Comm'rs v. Cox, 6 Ind. 403; Campbell v. Polk County, 49 Mo. 214 (1872); Boro v. Phillips County, 4 Dillon, 216, 223 (1877), citing text; *post*, chap. xx.

<sup>4</sup> Lake v. Williamsburgh, 4 Denio, 520 (1847), remedy of holder discussed; distinguished from Kelly v. Mayor, &c. of Brooklyn, 4 Hill (N. Y.), 263; and see McCullough v. Brooklyn, 23 Wend. (N. Y.) 458; Cuyler v. Rochester, 12 Wend. (N. Y.) 165; Argenti v. San Francisco, 16 Cal. 255, and note remarks of Field, C. J.; Martin v. San Francisco, *Id.* 285; Kingsberry v. Pettis Co., 48 Mo. 207 (1871). An instrument in this form:

DECEMBER, 31, 1836.

*City of Brooklyn, ss.* To the City Treasurer. Pay A. L. or order \$1500 for award No. 7, and charge to Bedford road assessment, &c.

J. T., Mayor.

A. G. S., Clerk.

*Held*, 1st. Negotiable, and not payable out of any special fund. 2d. The corporation was not discharged by failure to present and give notice, no damage or injury being sustained in consequence of the omission. Kelley v. Brooklyn, 4 Hill (N. Y.), 263 (1843); Steel v. Davis County, 2 G. Greene (Iowa), 469; Campbell v. Polk County, 3 Iowa, 467.

<sup>5</sup> Clark v. Des Moines, 19 Iowa, 199, 222; Edwards on Bills, 143; Pease v.



§ 506 (414). **Interest on Corporate Indebtedness.** — The rule in respect to *interest on debts* against municipal corporations does not ordinarily differ from that which *applies to individuals*.<sup>1</sup> Under the Missouri statute, providing generally that creditors shall be allowed interest at the rate of six per cent per annum, &c., it is held that county warrants draw interest after presentment to the treasury and refusal of payment by the treasurer, the court regarding the general statute as to interest broad enough to embrace all debtors, counties as well as individuals.<sup>2</sup> But in Illinois it is held that the debts of municipal corporations are payable at the treasury of the body; that interest on coupons — that is, interest on interest — cannot be recovered, unless there be a special agreement to that effect, since such corporations are not named in the act regulating interest. The court remarks: "Whatever power these corporations may possess to contract for the payment of interest, in the absence of any express legislation on the subject, we are of opinion that their indebtedness, in the absence of such agreement, does not bear interest."<sup>3</sup> If such instruments (coupons) could in any event draw interest without an express agreement, it could only be after a proper demand of payment. Until a demand is made, such a body is not in default. They are not like individuals, bound to seek their creditors to make payments of their indebtedness."<sup>4</sup> The general and sound

Cornish, 19 Me. 191; *Campbell v. Polk Co.*, 3 Iowa, 467; *Union Co. Comm'rs v. Mason*, 9 Ind. 97; *Bayerque v. San Francisco*, 1 McAll. C. C. R. 175; *Bull v. Sims*, 23 N. Y. 570; *Montague v. Horan*, 12 Wis. 599. In an action on a county order payable out of the three per cent fund, "as fast as the same shall accrue to the county," it *must be alleged* that the county has received money from the specific fund named applicable to the order in suit, or that the order was fraudulently drawn upon a fund in which the county had no assets. *Union Co. Comm'rs v. Mason*, 9 Ind. 97 (1857). See chapter on *Mandamus, post*.

<sup>1</sup> *Langdon v. Castleton*, 30 Vt. 285 (action on book account).

<sup>2</sup> *Robbins v. County Court*, 3 Mo. 57 (1831); *State v. Pacific*, 61 Mo. 155 (1875). In *Iowa*, coupons on county and city bonds are held to *draw interest*. *Rogers v. Lee County*, 1 Dillon C. C. R. 529. See *Evansville, &c. R. Co. v. Evansville*, 15 Ind. 395; *Hollingsworth v. Detroit*, 3 McLean, 472; *Pruyn v. Milwaukee*,

18 Wis. 367. If under authority to issue bonds with eight per cent interest, bonds be issued drawing twelve per cent, they are valid and bear interest at the statutory rate. *Quincy v. Warfield*, 25 Ill. 317. *Usury*. That usury can be predicated of a sale or issue by a corporation of its securities, see *Danville v. Sutherland*, 20 Gratt. (Va.) 555 (1871); *Lynchburg v. Norvell*, 20 Gratt. (Va.) 601 (1871); *Clark v. Des Moines*, 19 Iowa, 199. May be made *payable outside the State*. *Meyer v. Muscatine*, 1 Wall. 384; *Maddox v. Graham*, 2 Met. (Ky.) 56.

<sup>3</sup> *South Park Commissioners v. Dunlevy*, 91 Ill. 49; *Pekin v. Reynolds*, 31 Ill. 529; *People v. Salomon*, 51 Ill. 52; *Chicago v. People*, 56 Ill. 327 (1870); *Chicago v. Allcock*, 86 Ill. 384; *Cook v. South Park Commissioners*, 61 Ill. 115.

<sup>4</sup> *Pekin v. Reynolds*, 31 Ill. 529 (1863); *S. P. Chicago v. People*, 56 Ill. 327 (1870); *People v. Tazewell County*, 22 Ill. 147; *Johnson v. Stark County*, 24 Ill. 75. But if made payable at a place other than the treasury, the bonds are not void, but

view, however, is that coupons when due are regarded as in the nature of an independent claim, and draw simple interest, and only simple interest, unless otherwise expressly provided, from the date of maturity.<sup>1</sup>

§ 507. **Implied Power to borrow Money and issue Commercial or Negotiable Paper considered.** — Much conflict of opinion has existed in the American courts touching the *implied power* of public and municipal corporations to *issue commercial or negotiable instruments*, that is, instruments free from equities in the hands of innocent holders for value. In respect of *public* or *quasi* corporations, such as counties, &c., as distinguished from *municipal* corporations proper, the general current of authority is against the proposition that, as ordinarily organized, they possess any such implied power. And the power is not incident to the authority to make specified expenditures or to make local improvements, but it may be implied, where there is nothing to rebut it, from other powers, such as the express power to borrow money.<sup>2</sup>

But in view of the more complex and diversified powers usually conferred upon chartered or municipal corporations proper, there has been a stronger tendency on the part of the courts to hold that

only this provision in them. *Sherlock v. Winnetka*, 68 Ill. 530 (1873). *Post*, sec. 514, note. In *Madison County v. Bartlett*, 1 Scam. (2 Ill.) 67, it was held that counties were not liable to pay interest on their orders or warrants, not being named in the statute regulating interest, and the common-law not allowing it to be recovered. So in *Pennsylvania*. *Allison v. County*, 50 Pa. St. 351. In that State a county is not suable on its warrants, but suit must be on original claim. *Ib.* In *Ohio* coupons due semi-annually have been held to bear interest after maturity. *Wilson v. Neal*, 23 Fed. Rep. 129. In *California* when no provision is made for interest, both municipal bonds and their coupons bear interest after maturity at the rate fixed by law, whether the coupons are detached or not. *Nash v. El Dorado County*, 24 Fed. Rep. 252; *post*, chap. xx.

A city issued warrants or orders on its treasurer, payable when funds should be collected therefor from certain tax sales, with interest. The funds being collected the common council ordered the treasurer to notify holders of warrants, by publica-

tion in the official paper, to present the same for payment, and that interest would cease after a certain day. It did not appear that plaintiff knew of such publication, though duly made. It was held that the city was liable for interest on the warrants owned by plaintiff down to the time of their presentation. *Read v. Buffalo*, 74 N. Y. 463. Nor can it set up in bar of an action to recover a debt due from it, that it was once willing and offered to pay it; nor can it stop interest upon its obligations by publishing a notice in a newspaper that such interest will cease after a certain date, when the warrants bear interest. *Ib.*; see, also, *Hummel v. Brown*, 24 Pa. St. 311.

<sup>1</sup> *Supra*, sec. 486.

<sup>2</sup> *Police Jury v. Britton*, 15 Wall. 566 (1872). The ordinary powers possessed by counties, as agencies of the State in the administration of public affairs, do not give the incidental authority to issue negotiable bonds and coupons. See *Lynde v. Winnebago County*, 16 Wall. 6.

Distinction between *public* and *municipal* corporations, in the sense referred to in the text, see *ante*, secs. 22, 54, 58, 66.

such corporations, as usually existing in this country, have an incidental or implied power to issue commercial securities. The line of argument is substantially this: Trading and commercial corporations have this power as an incidental means of effecting their objects, why not municipal corporations as well? Municipal corporations are clothed with large powers, which naturally, if not necessarily, oblige them to use credit or to create debts; therefore, if they may create debts, they may borrow the money to pay them; and if they may borrow money, they have the incidental power to do like other borrowers, namely, give a negotiable bill, note, or bond therefor. The whole argument is, in our judgment, unsound. It is true that in this country private business corporations are usually considered to have the incidental power to borrow money or give negotiable paper as an evidence of their indebtedness, but in England it is held that express power is necessary to enable even railway corporations to draw, indorse, or accept bills of exchange.<sup>1</sup> But admit that the American doctrine is otherwise,<sup>2</sup> and that it is rightly so, still there is no resemblance between private and public or municipal corporations in this regard. The latter are simply agencies of government. They are not organized for trading, commercial, or business purposes. They have, in general, but one mode of meeting their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. For hundreds of years in England such corporations have existed, without it ever being contended that they could, without express authority, issue commercial paper. Private corporations are much more vigilant and watchful of their interests than it is possible for public or municipal corporations to be. The frauds which unscrupulous officers will be enabled successfully to practise, if an implied and unguarded power to issue negotiable securities is recognized, and which the corporation or the citizen will be helpless to prevent, is a strong argument against the judicial establishment of any such power. And the argument is unanswerable, when it is remembered that in ascertaining the extent of corporate powers there is no rule of safety but the rule of *strict* construction;<sup>3</sup> and that such an implied power is not necessary, however convenient it may be at times, to enable the corporation to exercise its ordinary and usual express powers,

<sup>1</sup> See observations of *Byles, J.*, in *Bateman v. Mid-Wales Railway Co.*, *Law Rep.* 1 C. P. 510 (1866). *Ante*, sec. 488.

<sup>2</sup> *Stratton v. Allen*, 16 N. J. Eq. 229; *McCullough v. Moss*, 5 Denio (N. Y.), 567; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59; 2 Kent's Com. 229; 1 Parsons' Notes

and Bills, 165; *ante*, sec. 488; *Desmond v. Jefferson*, 19 Fed. Rep. 483, holding that a power to purchase property — as a fire-engine — implies power to issue negotiable bonds for the purpose.

<sup>3</sup> *Ante*, secs. 89, 90, 91.

or to carry into effect the purposes for which the corporation is created.

§ 507 a. **Same subject. The Author's Conclusions.**— We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and as *incidental* thereto the power to issue commercial securities, that is, paper which cuts off defences when it is in the hands of a holder for value acquired before it is due. The cases on this subject are conflicting, but the tendency is towards the view above presented. The opinion of Mr. Justice Bradley, in a case before referred to,<sup>1</sup> evinces a thorough comprehension of the whole question, and, in our judgment, is sound in every proposition it advances, and must become the law of this country. This view is confirmed by the almost invariable legislative practice in the States to confer, when it is deemed expedient, upon municipalities and public corporations, in *express* terms, the power to borrow money or to issue negotiable bonds or securities; and it is of instruments thus authorized that we now proceed to treat. It is an undisputed doctrine that the power of public and municipal corporations to subscribe to the stock of railway companies and to issue bonds therefor must be *expressly* conferred.<sup>2</sup> The Supreme Court of

<sup>1</sup> The *Mayor v. Ray*, 19 Wall. 478 (1873). It is difficult to understand on what ground the dissenting judges in this case regarded the corporation warrants as "negotiable securities of a commercial character." The cases are almost uniform to the effect that such instruments do not partake of the nature of commercial paper, except that by usage and custom, and sometimes by legislative enactment, they pass by delivery. *Post*, sec. 509.

<sup>2</sup> The cases on this point are collected in sec. 161, note. See further on this subject, *ante*, sec. 117 *et seq.*

*Particular Statutes Construed. Illinois:* Harter v. Kernochan, 103 U. S. 562; approved *Pana v. Bowler*, 107 U. S. 529; *Kankakee v. Etna Life Ins. Co.*, 106 U. S. 668; *Prairie v. Lloyd*, 97 Ill. 179; *Windsor v. Hallett*, 97 Ill. 204; *Douglas v. Niantic Sav. Bank*, 97 Ill. 228. *Kansas:* *Lewis v. Barbour Co. Comm'rs*, 105 U. S. 739; *Bard v. Augusta*, 30 Fed. Rep. 906. For construction of the general statute of *Kansas* concerning the subscription by municipalities for stock of railroads

and the issue of bonds in payment therefor, see *McClure v. Oxford*, 94 U. S. 429; *Anderson County v. Beal*, 113 U. S. 227; *Crow v. Oxford*, 119 U. S. 215. *Tennessee:* *Kelley v. Milan*, 127 U. S. 189; s. c. below, 21 Fed. Rep. 842; *Taylor v. Ypsilanti*, 105 U. S. 60 (where by the vote authorizing a subscription, consent was given upon certain conditions). *Nebraska:* *Read v. Plattsmouth*, 107 U. S. 568; *State v. Babcock*, 19 Neb. 230; s. c. *Id.* 223. As to liability of counties in *Nebraska* for bonds issued by precincts and the remedy in such cases, see *Davenport v. County of Dodge*, 105 U. S. 237; *Blair v. Cuming County*, 111 U. S. 363; *Rosenbaum v. Bauer*, 120 U. S. 450; *Nemaha County v. Frank*, 120 U. S. 41. *Infra*, sec. 509. *California:* *Liebman v. San Francisco*, 24 Fed. Rep. 705. *Missouri:* *Ogden v. Daviess County*, 102 U. S. 634; *Tipton v. Rogers Loc. Works*, 103 U. S. 523. *New York:* *Thompson v. Perrine*, 103 U. S. 806; approved *Same v. Same*, 106 U. S. 589; *Red Rock v. Henry*, 106 U. S. 596. *Louisiana:* *Hall v. New Orleans*, 19 Fed. Rep.

the United States has repeatedly adjudged that the grant of power to a municipal corporation to appropriate moneys in aid of the construction of a railroad, where the power is accompanied with a provision directing the levy and collection of taxes to meet such appropriation, and prescribing no other mode of payment, gives no power, but excludes it, to issue negotiable bonds in payment of such appropriation.<sup>1</sup>

§ 508. **Taxation limited to Public Purposes; What are Such; Aid to Railways; Bonds to be paid by Taxation, for What Purposes authorized.** — After the numerous judgments of courts of the highest authority to that effect, it may be regarded as a settled doctrine of American law that *no tax can be authorized by the legislature for any purpose which is essentially private*, or, to state the proposition in other words, for any but a *public purpose*.<sup>2</sup> What is a public purpose may not always be easy to determine; but when determined, it constitutes the boundary of the power of taxation. Whether taxation to aid in the building of railways owned by private corporations is taxation for a *public* purpose is a question which has been decided by the courts of last resort in almost every State in the Union, and by the Supreme Court of the United States.<sup>3</sup> Although the doctrine of the constitutionality of such taxation has been vigorously combated, still it must be admitted that the great preponderance of the judicial judgments has been on the side of the

870 (a special law relating to New Orleans). *Alabama: Winters v. Montgomery*, 65 Ala. 403 (special law relating to Montgomery).

<sup>1</sup> *Claiborne County v. Brooks*, 111 U. S. 400, 406; *Wells v. Pontotoc Co. Sup.*, 102 U. S. 631, 632; *Ogden v. Daviess County, Ib.*, 634, 639; *Concord v. Robinson*, 121 U. S. 165 (1886).

<sup>2</sup> *Loan Assoc. v. Topeka*, 20 Wall. 655; *Curtis v. Whipple*, 24 Wis. 350; *Whiting v. S. & F. R. Co.*, 25 Wis. 167; *Allen v. Inhab. of Jay*, 60 Me. 124; *Jenkins v. Andover*, 103 Mass. 94; *Lowell v. Boston*, 111 Mass. 454; *Pray v. Northern Liberties*, 31 Pa. St. 69; *Mayor of New York, In re*, 11 Johns. (N. Y.) 77; *Camden v. Allen*, 2 Dutch. (N. J.) 398; *Sharpless v. Mayor of Phila.*, 21 Pa. St. 147; *Hanson v. Vernon*, 27 Iowa, 47; *Cooley Const. Lim.*, 129, 175, 214; *Parkersburg v. Brown*, 106 U. S. 487 (manufactories); *City of Eufaula v. McNab*, 67 Ala. 588. *Infra*, sec. 510. Bonds issued under a statute to

aid a company in improving the water-power of the river for the purpose of propelling public grist-mills, held to be issued to aid in constructing a "work of internal improvement," within the meaning of the statute in question. *Blair v. Cuming County*, 111 U. S. 363. *Aliter* as to steam grist-mills, *Osborne v. County of Adams*, 106 U. S. 181; s. c. 109 U. S. 1; see and compare *Township of Burlington v. Beasley*, 94 U. S. 310; *post*, sec. 736, and cases cited; *Cooley on Taxation*, chap. iv., "where the purposes for which taxes may be laid" are enumerated, and illustrated by the adjudicated cases.

<sup>3</sup> *Ante*, secs. 153, 157; *Rogers v. Burlington*, 3 Wall. 654; *Marshall Co. Sup. v. Schenck*, 5 Wall. 772, 779; *Olcott v. Fond du Lac Sup.*, 16 Wall. 678; *Burlington & Mo. River R. Co. v. Otoe Co.*, 16 Wall. 667; *Citizens' Sav. & Loan Assoc. v. Topeka*, 20 Wall. 655; *Pine Grove Tp. v. Talcott*, 19 Wall. 666 (1873).

competency of such legislation, in the absence of special constitutional restraint.<sup>1</sup> And therefore the legislature may authorize subscriptions by municipalities to the stock of railway corporations, or donations to them, and provide for the payment of such subscriptions or donations<sup>2</sup> by the issue and sale of the negotiable bonds of the municipality. But a statute which authorizes the issue of bonds to be paid by taxation to aid certain individuals or classes, or in aid of the *manufacturing enterprise* of individuals or private corporations, is void, this being, within the meaning of the rule, a *private*, as distinguished from a *public* purpose, although in a remote or collateral way the local public might be benefited thereby.<sup>3</sup> The execution of the powers of local government and administration ordinarily conferred upon municipal corporations, such as improving highways and streets, constructing water-works, gas-works, markets, preserving the public health, and the like, are of course public purposes; and upon legislative authority being given, negotiable bonds may be issued therefor. What will constitute sufficient authority for the issue of such bonds will be considered further on.

§ 509. **Different Classes of Bonds; Implied and Express Power to issue; Recitals; Mode of Pleading.**—Negotiable securities of the kind here referred to have been issued by *municipal corporations proper* (generally under an *express* power to aid railways, or for gas-works, water-works, or specified local improvements, but sometimes under an *implied* power); and *by counties*, usually under express power (generally to aid railways, or for public buildings, bridges, or improvements<sup>4</sup>); and *by organized townships* which are parts of

<sup>1</sup> In *Pine Grove Township v. Talcott*, 19 Wall. 666, 677, Mr. Justice Swayne says that such legislation has been sustained in nineteen out of twenty-one States. As respects legislative power, donations and subscriptions for stock stand on the same ground. *Town of Queensbury v. Culver*, 19 Wall. 83 (1873).

If it be allowable to judge of a legal principle by its fruits, the dissenting and minority judges on this question will find much to confirm the conviction that their views were sound. But it is useless to fight that battle over again; it has been fought and lost. All that is left is the contemplation and contrast of what might have been and what is.

<sup>2</sup> *Wood v. Oxford*, 97 N. C. 227. The Constitution of *Texas* prohibits municipal corporations from making appropriations

or donations, or loans of credit to private corporations. *Cleburne v. Gulf, Colorado, & S. F. Ry.*, 66 Tex. 457; *ante*, sec. 157.

<sup>3</sup> Authority to borrow money "to be expended in developing the *natural advantages of a city for manufacturing purposes*," does not warrant the issue of bonds as a donation to an individual to aid in developing the water power of the city. One who holds such bonds with notice of the facts cannot recover upon them. *Ottawa v. Carey*, 108 U. S. 110; *ante*, sec. 161.

<sup>4</sup> In several of the States power is given to municipalities or counties to issue bonds to aid works of "*internal improvement*." And under this generic term, the question has arisen, What are works of internal improvement? The Supreme Court of *Alabama*, in defining the phrase "*internal improvements*," says: "Where

counties, under express authority, and usually as a means of aiding the construction of railways; and *by school districts*, under express power, to raise money to erect school-houses. In some of the Western States, counties have been legislatively made the agents for the *inhabitants of non-incorporated townships*, and in Missouri for "strips of territory" to issue bonds in the name of the county, but to be paid out of the property within the specified township or designated territorial limits or strip of country.<sup>1</sup> Reference is made to this subject here in order to observe that where the bonds or securities are issued under an express power, the legislative act, being the only source of the authority, measures and limits the power it confers,<sup>2</sup> and the same principle applies to the instruments issued under

internal improvements under State authority are spoken of, it is universally understood that works within the State, by which the public are supposed to be benefited, are intended; such as the improvements of highways and channels of travel and commerce." *Wetumpka v. Winter*, 29 Ala. 660.

The legislature of *Nebraska* passed an act "That any county or city in the State of *Nebraska* is hereby authorized to issue bonds to aid in the construction of any railroad or other work of *internal improvement*, to an amount to be determined by the county commissioners of such county, or the city council of such city, not exceeding ten per cent of the assessed valuation of all taxable property in said county or city, *provided* the county commissioners or city council shall first submit the question of issuing bonds to a vote of the legal voters of said county or city, in the manner provided by chapter ix. of the Revised Statutes of the State of *Nebraska* for submitting to the people of a county the question of borrowing money." Session Laws of 1869, page 92. Under this act, a county and a precinct issued bonds to build a bridge across the Platte River, and on an application by a taxpayer to restrain the collection of taxes levied to pay interest on such bonds, the Supreme Court of *Nebraska*, construing the above act in the light of the legislation of the State, held that a *bridge* was a work of "internal improvement" within the meaning of the statute, and that under the power to *aid*, the county might itself construct the bridge. *Union Pacific Railroad*

*Co. v. Colfax County*, 4 Neb. 450 (1876); s. c. 3 Cent. Law Jour. 287; *infra*, sec. 510, and note.

In *Montana* it is held that the legislature may authorize the creation of county indebtedness for public roads. *Wilcox v. Deer Lodge Co.*, 2 Mont. T. 574.

<sup>1</sup> Construction of the *Missouri township* railway aid act of March 23, 1868, and the rights and remedies of the bondholder. *Jordan v. Cass Co.*, 3 Dillon C. C. R. 185; *Same v. Same*, *Id.* 245; *Washburn v. Cass Co.*, *Id.* 251; *Harshman v. Bates County*, *Id.* 150; 92 U. S. 569 (1875); s. c. 3 Cent. Law Jour. 367, referred to at large, *infra*. Construction of *Kansas* legislation. *Thayer v. Montgomery Co.*, 3 Dillon C. C. R. 389, and note.

*Precinct bonds*, *supra*, sec. 507, note.

<sup>2</sup> Thus a power to issue bonds of \$1000, each bearing interest at six per cent, will not authorize the issue of bonds of a different amount and at a greater rate of interest, as eight per cent. *Taxpayers of Milan v. Tennessee Central R. R. Co.*, 11 Lea, 329. A power to subscribe to the stock of a railroad a certain sum "payable in not exceeding four years by annual assessments," and authorizing the issue of bonds in anticipation of the collections, held not to warrant the issue of bonds payable in ten years. *Norton v. Dyersburg*, 127 U. S. 160. In this case it was contended that the town should be held liable as upon non-negotiable bonds or notes, treating the issue of the negotiable bonds as an excess of authority only, and not invalidating the loan as agreed upon. But the court said: "It is a sufficient

statutory authority by *any* of these classes of corporations, or *quasi* corporations. But in respect to all these corporations and *quasi* corporations, except, possibly, municipal or chartered corporations proper, there is, we suppose, no solid ground to contend that they have any inherent or general power to issue commercial securities, and the true doctrine is that they can only do so by virtue of express legislative authority, which *must* exist in fact and which ought regularly to be recited in the bond. And in respect to municipal or chartered corporations, our opinion, as shown in a preceding section, is that they also have no such inherent power, and no power whatever except so far as conferred expressly or by fair implication. This is an important principle; and it results therefrom that there is no presumption in favor of the power to issue such securities, especially on the part of *quasi* corporations; and it would seem to follow that if the bonds of municipal or public corporations contain no recital as to the authority for their issue or their purpose, there is no presumption in favor of their validity, and it devolves on the holder to aver and show by evidence *aliunde* that the bonds were issued for some purpose authorized by statute. And hence, also, as a *matter of pleading*, the authority or power to issue the bonds in suit ought to appear on the face of the declaration, or by some recital in the bonds made part thereof; that is, it should thus appear that they were issued for some purpose authorized by statute.<sup>1</sup>

answer to this proposition to say that this suit is brought solely for a recovery upon the bonds and coupons, and no question growing out of the liability of the town for the subscription to the stock can be inquired into in this suit."

<sup>1</sup> *Thayer v. Montgomery Co.*, 3 Dillon C. C. R. 389, and note; *Kennard v. Cass County*, *Ib.* 147; *Nashville v. Ray*, 19 Wall. 468.

*Mode of declaring on bonds and coupons.* *Kennard v. Cass County*, 3 Dillon C. C. R. 147, and cases cited in note on p. 150; *Thayer v. Montgomery County*, *supra*. A declaration on bonds against a municipal corporation having no general authority to issue commercial paper, to be sufficient on demurrer, must show, either by averment or in the copies of the bonds annexed, that the defendant had power to issue them. It is not sufficient to allege generally that it had full power and authority to execute the bonds. *Hopper v. Covington*, 118 U. S. 148.

*Mode of pleading defences.* The plea of the *general issue* in *assumpsit* in States where that mode of pleading is yet allowed, puts in issue the question of the authority of the officers to issue the bonds and the *bona fides* of the plaintiff, but presumptively the plaintiff is a holder for value before maturity, without notice; the contrary must be shown by the defendant. *Chambers County v. Clews*, 21 Wall. 317 (1874); *Pendleton County v. Amy*, 13 Wall. 297. Special plea erroneously held bad considered as amounting to the general issue; and as the erroneous ruling was harmless, the judgment was not reversed. *Ib.* Answer denying that plaintiff is the owner, holder, or bearer of the coupons in suit good on general demurrer. *Pendleton County v. Amy*, 13 Wall. 297. *Proof of execution* of bond when denied under oath. Under the legislation of *Alabama*, *non assumpsit* does not involve the *factum* of the bonds. *Chambers County v. Clews*, 21 Wall. 317 (1874). Corpora-



§ 510. **Bridges as Works of Internal Improvement; Validity of Bonds issued therefor.** — In many States negotiable securities have been issued under statute provisions authorizing *the making of internal improvements*. In a case in the Supreme Court of the United States<sup>1</sup> the question arose as to whether *a toll-bridge was a work of*

tion may plead *nil debet* and *non est factum*. *Grand Chute v. Winegar*, 15 Wall. 355 (1872). Defence of *non est factum* sustained. *Coler v. Cleburne*, 131 U. S. 162 (1889). Here the statute provided for the issue of bonds by cities, and directed that such bonds *should be signed by the mayor*, and by him forwarded to the Comptroller of the State for registration, and a city, by proper ordinance, authorized the issue of bonds for water-works. The bonds were dated January 1, 1884. The term of the mayor then in office expired in April following, and he was succeeded by a new officer. In July, 1884, the common council, by resolution, requested the ex-mayor, whose name had been engraved on the coupons, to sign the bonds. He did so, adding the word "Mayor" after his signature, and forwarded the bonds to the Comptroller, who duly registered them. In an action upon coupons brought by a *bona fide* holder for value, the Supreme Court of the United States held that as the statute provided for the signing and forwarding of the bonds by the mayor, *the mayor at the time of signing* was the only officer having power to sign and forward them, and that the city could not designate any other person to act in his stead. "*Bona fide* purchasers of municipal bonds must," said the court, "take the risk of the official character of those who execute them." The city is not estopped from defending upon the facts, and these facts established its plea of *non est factum*. This case is controlled by the principle of *Anthony v. County of Jasper*, 101 U. S. 693, and is to be distinguished from *Weyauwega v. Ayling*, 99 U. S. 112, and is held to be analogous to *Amy v. Watertown*, No. 1, 130 U. S. 301.

*Remedy at law.* A corporation cannot be relieved against its bond in equity if the ground for relief shows a complete defence or an adequate remedy at law. *Grand Chute v. Winegar* (case in equity), 15 Wall. 373.

<sup>1</sup> *Dodge Co. Comm'r's v. Chandler*, 96 U. S. 205 (1877). *Works of internal improvement defined.* *Fremont Building Assoc. v. Sherwin*, 6 Neb. 48 (1877); *Burlington Tp. v. Beasley*, 94 U. S. 310; *Guernsey v. Burlington Tp.*, 4 Dillon, 372 (1877); *Lewis v. Sherman Co. Comm'r's*, 5 Fed. Rep. 269; *ante*, sec. 509, note. In the opinion of the court in *The County Comm'r's v. Chandler*, *supra*, it is said: "In approaching the solution of these questions, the first inquiry that naturally presents itself is, *whether a toll-bridge, like that referred to, is a public bridge, and hence a work of internal improvement.* And we can hardly refrain from expressing surprise that there should be any doubt on the subject. What was the bridge built for, if not fit for public use? Certainly not for the mere purpose of spanning the Platte River as an architectural ornament, however beautiful it may be as a work of art; nor for the private use of the common council and their families; nor even for the exclusive use of the citizens of Fremont. All persons, of whatever place, condition, or quality, are entitled to use it as a public thoroughfare for crossing the river. The fact that they are required to pay toll for its use does not affect the question in the slightest degree. Turnpikes are public highways, notwithstanding the exaction of toll for passing on them. Railroads are public highways, and are the only works of internal improvement specially named in the Act; yet no one can travel on them without paying toll. Railroads, turnpikes, bridges, ferries, are all things of public concern, and the right to erect them is a public right. If it be conceded to a private individual or corporation, it is conceded as a public franchise; and the right to take toll is granted as a compensation for erecting the work, and relieving the public treasury from the burden thereof. Those who have such franchises are agents of the public. They have, it is true, a private interest in

*internal improvement* for which bonds might under the statute legally be issued to aid in building. The court held that "all bridges intended and used as thoroughfares are public highways, whether subject to toll or not, and that county bonds which have been issued under a statute authorizing the issue of such bonds in aid of an internal improvement are valid when given for the building of a bridge which is a thoroughfare, though tolls are charged thereon by the county. Whether the county has the right to demand tolls over a bridge which is a thoroughfare will not affect the validity of county bonds issued to aid in the construction of the bridge."

**§ 511. The Law of Railroad Aid Bonds ; the Law on this Subject as developed in the Federal Courts.** — Where the policy of burdening the future has been sanctioned by the legislature, the courts have to deal with the legal rights of the municipality on the one hand and with those of the holders of its obligations on the other. The determination of their legal rights involves inquiries as com-

the tolls ; but the works are public and subject to public regulation, and the entire public has the right to use them. These principles are so elementary in the common law that we can hardly open our books without seeing them recognized or illustrated. Of course there may be private bridges as there may be private ways, and they are put in the same category by the text-writers ; but all bridges intended and used as thoroughfares are public highways, whether subject to toll or not. Regularly, all public bridges are a county charge, and the county is bound to erect and maintain them ; but others may be charged with this duty, and a toll is the commonest of means for obtaining compensation for its performance. In Angell on Highways it is said that public bridges may be divided into three classes : 'First, those which belong to the public, as State, county, or township bridges, over which all people have a right to pass without or with paying toll : these are built by public authority at the public expense, either of the State itself or of a district or portion of the State. Secondly, those which have been built by companies (like turnpike and railroad companies), or at the expense of private individuals, over which all persons have a right to pass on the payment of a toll fixed by law. Thirdly, those

which have been built by private individuals, and which have been surrendered or dedicated to the use of the public.' Chancellor *Kent* says, 'The privilege of making a road or establishing a ferry, and taking tolls for the use of the same, is a franchise, and the public have an interest in the same ; and the owners of the franchise are answerable in damages if they should refuse to transport an individual without any reasonable excuse, upon being paid or tendered the usual rate of fare.' In the same connection he enumerates in this class of franchises, ferries, bridges, turnpikes, and railroads. In our judgment the bridge in question is a public bridge and a work of internal improvement within the meaning of the statute." In *Dawson Co. v. McNamar*, 10 Neb. 276 (1880) ; s. c. 4 N. W. R. 991, it was held that under the statute of *Nebraska* a court-house is not an internal improvement, and that a recital in the bonds that they were issued under authority of the aforesaid "internal improvement acts" did not invalidate the bonds, inasmuch as there was implied authority found elsewhere in the Act, whose provisions had been substantially observed. *Steam grist-mill* not an internal improvement. *Supra*, sec. 508, note. *Water-power for public grist-mill* is such a work. *Supra*, sec. 508, note.

plicated as they are important. The law on this subject is substantially the growth of the last few years. The decisions in the various State and Federal courts are very numerous, and on some points conflicting.<sup>1</sup> It is impossible, were it even desirable, to

<sup>1</sup> *Ante*, chap. vi. sec. 153 *et seq.* Since the decision of the Supreme Court of *Michigan*, in *The People v. Township Board of Salem*, 20 Mich. 452; s. c. 9 Am. Law Reg. (N. S.) 487, before mentioned (*ante*, sec. 157), the question arose in the United States circuit court for the Western district of *Michigan*, in an action on municipal railway aid bonds, whether the Federal court was *concluded* by the judgment of the Supreme Court of the State, and if not, whether the holder of bonds issued in full compliance with the statute could recover thereon. *Emmons*, Circuit Judge, in an elaborate opinion, holds, as to bonds issued *before* the decision of the Supreme Court of the State, that the Federal courts are not concluded thereby, and that the constitutional power of the legislature to authorize their issue, in the absence of special limitations, must be regarded as settled, at least as respects the Federal tribunals. The opinion displays great research and learning, and will be found reported under the name of *Talcott v. Township of Pine Grove*, vol. i. Bench and Bar (N. S.), 50 (1872). The Supreme Court of *Michigan* adheres to its opinion on this subject in the later case of *The People v. State Treasurer*, 23 Mich. 499. The course of reasoning of *Emmons, J.*, in this case is coincident with that of the Supreme Court of the United States in the case of *Olcott v. Fond du Lac Sup.*, 16 Wall. 678 (1872). In the case just mentioned the circuit court of the United States, sitting in *Wisconsin*, decided that since the Supreme Court of that State had held a certain act under which the bonds in question were issued to be unconstitutional, and had never holden otherwise, that this construction, though given after the bonds were issued, was binding upon or should be followed by the Federal courts. But the Supreme Court of the United States was of the opinion that, inasmuch as the decision of the State Supreme Court was not based upon

any special and peculiar provision of the State Constitution, but upon general principles of law, and related to contracts, the case was not one in which the decision of the State court had any other than a persuasive force; and it reversed the judgment of the circuit court, and held that the bonds could be enforced.

Rights in respect of negotiable bonds, accruing under a construction given by the highest court of the State will not be affected in the Federal court by a subsequent change of decisions in the State court. *Anderson v. Santa Anna*, 116 U. S. 356 (1885). In suits upon negotiable bonds issued *before* any construction of the State laws by the State Supreme Court, the subsequent construction of those laws by such court is not conclusive on the Federal courts. *Anderson v. Santa Anna, supra*. A constitutional provision requiring that two-thirds of the qualified voters shall assent requires only two-thirds of those actually voting at the election. *Carroll County v. Smith*, 111 U. S. 556; following *St. Joseph Township v. Rogers*, 16 Wall. 644; *County of Cass v. Johnston*, 95 U. S. 360 (*ante*, sec. 44, note); disregarding *Hawkins v. Carroll County*, 50 Miss. 735, the bondholders' rights having been acquired before such decision was made. *Post*, secs. 515, 517, and cases, cited.

In *Gilchrist v. Little Rock*, 1 Dillon C. C. R. 261, and in *Ranlett v. Leavenworth*, *Ib.* 263, the circuit court of the United States for the eighth circuit, prior to any decisions of the Supreme Courts of the States of *Arkansas* and *Kansas* as to the constitutional validity of municipal railway aid bonds, declined to pronounce such bonds in the hands of *bona fide* holders to be void for the want of authority in the State legislature to authorize their issue. *History of the well-known Iowa municipal bond cases. King v. Wilson*, 1 Dillon C. C. R. 555. The word "aid" as used in the statute of *Nebraska* includes the power to make "donations" to railroads. *State v. Babcock*, 19 Neb. 230.

compass within the limits of a single chapter all the learning, and to refer to all the cases, upon the subject of municipal securities. It will not be attempted. By reason of the greater favor with which the rights of the holders of such securities have been regarded by the Supreme Court of the United States, the volume of municipal bond litigation has of late years taken place in the Federal courts. It is, therefore, necessary to consider the law on this subject as determined by the Supreme Court of the United States; and our object will be to show exactly the doctrines and principles which have received the sanction of that tribunal, and to illustrate, as far as needful, their application in particular instances, referring incidentally or for further illustration to the decisions of the State courts on the subjects or topics discussed. The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation, even when made on legal grounds deemed solid by the State courts, as well as by municipalities which had been deceived and defrauded. That such securities have any general value left is largely due to the course of adjudication in respect thereto by the Supreme Court, and the reliance which is felt by the public that it will stand firmly by the doctrines it has so frequently asserted.<sup>1</sup>

§ 512. **Form of Bond ; Condition.**—Municipal bonds, in the usual form, containing words of negotiability, with coupons attached, are absolute, and not conditional, promises to pay, and hence *are negotiable with all the incidents of negotiability*. Such bonds are held to be negotiable notwithstanding they contain such a recital as the following: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through the said township, in pursuance of and in accordance with an act of the legislature of the State of Kansas, entitled 'An Act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February

<sup>1</sup> "The Federal courts, which have with great unanimity sustained the validity of municipal bonds, should hesitate long before accepting the forced and narrow interpretation contended for by the defendant. These solemn obligations, issued to invite the investors of the world, should not be invalidated except for grave and serious infirmities. Even if the ques-

tion were a doubtful one, a construction should be given to the statute which upholds the bonds, rather than one which turns them to ashes in the hands of the *bona fide* holder." *Coze, J.*, in *Rich v. Town of Mentz*, 18 Fed. Rep. 52. To same effect, *Shelley v. Charles County*, 17 Fed. Rep. 909, per *McCrory, J.*

25, 1870;’ and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, *upon the performance of the said condition*, the faith of the aforesaid Humboldt Township, as also its property, revenue, and resources, is pledged;” the court holding that the construction of the road through the township was not a condition upon which payment was to be made.<sup>1</sup>

<sup>1</sup> Humboldt Township v. Long, 92 U. S. 644 (1875); 3 Cent. Law Jour. 494. *Infra*, sec. 513, and note. In giving its judgment, in the case above cited, the court says: “Relying upon this clause of the certificate, the township contends that the construction of the railroad through the township was a condition upon which the payment was agreed to be made. We think, however, this is not the true construction of the contract. The construction of the road as well as the subscription for stock was mentioned in the recital as the reasons why the township entered into the contract, not as conditions upon which its performance was made to depend. It was for the purpose of subscribing, and to aid in the construction of the road, that the bond was given. The words ‘upon the performance of the said condition’ cannot, then, refer to anything mentioned in the recital, for there is no condition there. A much more reasonable construction is, that they refer to a former part of the bond, where the annual interest is stipulated to be payable at a banker’s, ‘on the presentation and surrender of the respective interest coupons.’ Such presentation and surrender is the only condition mentioned in the instrument. But that stipulation presents no such contingency as destroys the negotiability of the instrument. It is what is always implied in every promissory note or bill of exchange, that it is to be presented, and surrendered when paid. As well might it be said that a note payable on demand is payable upon a contingency, and therefore non-negotiable, as to affirm that one payable on its presentation and surrender is, for that reason, destitute of negotiability.” See also, Hotchkiss v. Nat. Banks, 21 Wall. 354 (1874). *As to form of bonds, seal, place of payment and delivery*, see cases cited Daniel on Neg. Instr., secs. 1492–1499. Cannot be issued

in blank as to date. Jackson Co. Sup. v. Brush, 77 Ill. 59 (1875).

Power to *substitute* other bonds. Lynde v. Winnebago County, 16 Wall. 6; McKee v. Vernon, 3 Dillon C. C. R. 210.

*Coupons; Form of Instrument.* — Maker suable thereon in assumpsit, where the bonds are made by the defendant corporation and refer to the coupon, though the latter, signed by the agents of the corporation, is in the form of an order or check on a bank named therein. Town of Queensbury v. Culver, 19 Wall. 83 (1873). Cases as to the form of coupons, see Daniel on Neg. Instr., secs. 1492–1496. May be made payable *beyond limits of the State*, unless specially restrained by statute. Lynde v. Winnebago County, 16 Wall. 6. Coupons when severed from the bonds are independent claims and may be sued on as such. Knox Co. Comm’rs v. Aspinwall, 21 How. 539, 546. *Supra*, sec. 486, note. Limitations of actions on. Clark v. Iowa City, 20 Wall. 583; *supra*, sec. 486, note. When payable to bearer or order are negotiable instruments. *Id.*; Aurora City v. West, 7 Wall. 82; Gelpecke v. Dubuque, 1 Wall. 175. Instance where form of coupon was held not to give it a negotiable character. Myers v. York, &c. R. R. Co. 43 Me. 282; but *quere*, and see Woods v. Lawrence County, 1 Black, 386.

*How signed.* — The coupons, where the bonds are properly signed and sealed, may be *signed by a printed fac-simile* of the maker’s autograph, adopted for the purpose, although there is no statute authorizing it. Pennington v. Baehr, 48 Cal. 565; s. c. 2 Cent. Law Jour. 92; see McKee v. Vernon Co., 3 Dillon C. C. R. 210; Lynde v. County, 16 Wall. 6; State v. Terrebonne Parish Police Jury 30 La. An. 287; Neeley v. Yorkville, 10 S. C. 141. *Mistakes corrected in equity.* Where a town voted to issue railway aid

§ 513. **Such Bonds are Negotiable Securities.** — The following doctrines are too well settled to be any longer open to question. A *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited. Municipal bonds, payable to bearer, are subject to the same rules as other negotiable paper.<sup>1</sup> A purchaser of a municipal bond from a *bona fide* holder, who obtained it for value before maturity, takes it free from equities, though he himself may have had notice thereof.<sup>2</sup> An overdue and unpaid coupon for interest, attached to a municipal bond which has several years to run, does not render the bond and the subsequently maturing coupons dishonored paper, so as to subject them, in the hands of an innocent purchaser for value, to defences good against the original holder.<sup>3</sup> A *bona fide* purchaser for value of negotiable

bonds to run 20 years, with the right to pay them in 10 years, and the bonds were printed and issued, by mistake, without the option clause, a proceeding in equity to correct them, brought by the town against holders who had purchased them with full knowledge of the facts, was sustained. *Town of Essex v. Day*, 52 Conn. 483.

<sup>1</sup> *Cromwell v. Sac Co.*, 96 U. S. 51 (1877); *ante*, sec. 512; *Baes v. Hewitt*, 20 Wis. 460; *Gorgier v. Mieville*, 3 B. & C. 45; *Brooks v. Mitchell*, 9 M. & W. 15; *Goodwin v. Roberts*, L. R. 1 App. Cas. 476; *Goodman v. Harvey*, 4 A. & E. 870; *Burnham v. Brown*, 23 Me. 400; *Oridge v. Sherborne*, 11 M. & W. 374; *United States v. Union Pacific R. R. Co.*, 91 U. S. 72; *Miller v. Race*, 1 Burr. 452; *White v. V. & M. R. Co.*, 21 How. 575; *Moran v. Miami County*, 2 Black, 722 (1862); *Mercer County v. Hackett*, 1 Wall. 83; *Gelpeke v. Dubuque*, 1 Wall. 175; *San Antonio v. Lane*, 32 Tex. 405; *Lexington v. Butler*, 14 Wall. 282; *St. Joseph v. Rogers*, 16 Wall. 644 (1872); *Humboldt v. Long*, 92 U. S. 642; *Macon Co. v. Shores*, 97 U. S. 272; *Calhoun Co. Sup. v. Galbraith*, 99 U. S. 214; *Comm'rs v. Block*, 99 U. S. 686; *Block v. Bourbon Co. Comm'rs*, 99 U. S. 686; *Marshall Co. Sup. v. Schenck*, 5 Wall. 784; *New Providence v. Halsey*, 117 U. S. 336; *Ottawa v. First Nat. Bank of Portsmouth*, 105 U. S. 342; *Wilson County v. Third*

*Nat. Bank of Nashville*, 103 U. S. 770; *Burleigh v. Rochester*, 5 Fed. Rep. 667. A municipal bond in the usual form is not rendered non-negotiable by a provision that it should be "payable at the pleasure of the obligor at any time before due." *Ackley School District v. Hall*, 113 U. S. 135 (1884). *Supra*, sec. 512. Bonds payable on the completion of a railroad and to bearer only, held not negotiable as being payable on a contingency which might never happen, and for want of certainty as to the payee. *Blackman v. Lehman*, 63 Ala. 547. As to negotiability of coupons which are due, detached from municipal bonds not due, see *Thompson v. Perrine*, 106 U. S. 589. An ordinary municipal bond, negotiable in form, is "a promissory note negotiable by the law merchant," within the meaning of the Act of March 3, 1875, which allows instruments of that class to be sued on in the Federal courts, by an assignee, notwithstanding the assignor could not have sued thereon in such courts if no assignment had been made. *New Providence v. Halsey*, 117 U. S. 336 (1885); *Ackley School District v. Hall*, 113 U. S. 135. Colorable and collusive transfers to citizen of another State of bonds and coupons will not give the Federal court jurisdiction. *Farmington v. Pillsbury*, 114 U. S. 138.

<sup>2</sup> *Cromwell v. Sac Co.*, 96 U. S. 51 (1877). *Ante*, sec. 486.

<sup>3</sup> *Cromwell v. Sac Co.*, 96 U. S. 51

securities before their maturity may recover against the maker the full amount of them, though he may have paid for them less than their par value.<sup>1</sup>

§ 514. *Lis Pendens* not applicable. — Another doctrine established in reference to such securities is that the *principle of lis pendens* is not applicable thereto. There may be actions pending regarding the bonds, but this will not affect the purchaser with constructive notice. It is a general rule that all persons dealing with real property are bound to take notice of a suit pending with regard to the title thereof, and will, at their peril, purchase the same from any of the parties to the suit. But this rule does not apply to negotiable securities purchased before maturity.<sup>2</sup>

§ 515. *Course of Decision in the Supreme Court of the United States.* — In municipal bond cases the Supreme Court of the United States does not hold itself concluded by decisions of the State courts made *after* the bonds have been negotiated, unless possibly where the question is one exclusively depending upon the construction of local and peculiar provisions of the State Constitution or enactments.<sup>3</sup> It has rejected, when necessary to protect

(1877); *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. 110; *Nat. Bank of N. A. v. Kirby*, 108 Mass. 497.

<sup>1</sup> *Cromwell v. Sac Co.*, 96 U. S. 51 (1877); *Lay v. Wissman*, 36 Iowa, 305; *Nat. Bank of Mich. v. Green*, 33 Iowa, 140; *Park Bank v. Watson*, 42 N. Y. 490; *Fowler v. Strickland*, 107 Mass. 552; *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Allaire v. Hartshorne*, 1 Zab. (21 N. J. L.) 665; *Williams v. Smith*, 2 Hill (N. Y.), 301; *Chicopee Bank v. Chapin*, 8 Met. (Mass.) 40. As to power of a city or municipality to sell, or to agree to sell, or dispose of its bonds or obligations for less than their par value. *Memphis v. Brown*, 20 Wall. 289 (1873); *Shirk v. Pulaski County*, 4 Dillon, 209 (1877); *Mayor of Nashville v. Ray*, 19 Wall. 468 (1873).

<sup>2</sup> *Leitch v. Wells*, 48 N. Y. 586; *Stone v. Elliott*, 11 Ohio St. 252; *Kieffer v. Ehler*, 18 Pa. St. 388; *Durant v. Iowa Co.*, 1 Woolw. 69; *Winston v. Westfeldt*, 22 Ala. 760; *Olcott v. Supervisors*, 16 Wall. 678; *National Bank v. Texas*, 20 Wall. 72; *Minns v. West*, 38 Ga. 18; *Warren v. Marcy*, 97 U. S. 96; *Warren v. Post*, 97 U. S. 110; *Warren v. Portsmouth*

*Sav. Bank*, 97 U. S. 110; *Orleans v. Platt*, 99 U. S. 676; *Cass Co. v. Gillette*, 100 U. S. 585. The pendency of a suit relating to the validity of negotiable paper not yet due is not constructive notice to subsequent holders thereof before maturity; and this rule cannot be changed by State laws or decisions, so as to affect the rights of persons outside the State. *Enfield v. Jordan*, 119 U. S. 680 (1886). *Scotland County v. Hill*, 132 U. S. 107 (1889). Although it is held by the Supreme Court of *Illinois* that a municipal corporation cannot lawfully make its obligations payable at any other place than the office of the treasurer (*ante*, sec. 506, note), yet if thus made payable, it does not affect the validity of the bond, or charge the *bona fide* holder with notice of judicial proceedings between a previous holder and a municipality so as to work an estoppel. *Enfield v. Jordan*, *supra*.

<sup>3</sup> *Gelpcke v. Dubuque*, 1 Wall. 175 (1865); *Havemeyer v. Iowa County*, 3 Wall. 294; *Thompson v. Lee County*, *Id.* 327; *Lee County v. Rogers*, 7 Wall. 181. See particularly on this point, *Olcott v. Fond du Lac Sup.*, 16 Wall. 678 (1872);

the *bona fide* holders of such securities, narrow and rigid constructions of statutes and charters authorizing the creation of such debts.<sup>1</sup>

*Butz v. Muscatine*, 8 Wall. 575, explained; *Carroll Co. Sup. v. United States*, 18 Wall. 71; *Chicago v. Sheldon*, 9 Wall. 50; *Pine Grove Tp. v. Talcott*, 19 Wall. 666; *Elnwood v. Marcy*, 92 U. S. 289 (1875); *Anderson v. Santa Anna*, 116 U. S. 356; *Claiborne County v. Brooks*, 111 U. S. 400; *Taylor v. Ypsilanti*, 105 U. S. 60, following *Douglass v. County of Pike*, 101 U. S. 677, where Chief Justice *Waite* said, "The rights of the parties are to be determined according to the law as it was judicially construed to be *when* the bonds in question were put on the market as commercial paper." *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73; *Ralls County v. Douglass*, 105 U. S. 728; *Foote v. Johnson Co.*, 5 Dill. 208 (1878); *Cass Co. v. Johnson*, 95 U. S. 360; *Cutler v. Board, &c.*, 56 Miss. 115; *Vicksburg v. Lombard*, 51 Miss. 126; *ante*, sec. 511; *post*, sec. 517; *Kenosha v. Lamson*, 9 Wall. 477; *Campbell v. Kenosha*, 5 Wall. 194 (1866). Read last two cases in connection with *Foster v. Kenosha*, 12 Wis. 616, which, in effect, is overruled or disregarded. See on this point *Steines v. Franklin County*, 48 Mo. 167; *Columbia County v. King*, 13 Fla. 451.

In speaking of the *force of the State court decisions* in the Federal courts in this class of cases, Mr. Justice *Strong*, in *Venice v. Murdock*, 92 U. S. 494 (1875), holds this language: "It is argued, however, that the New York decisions (*Starin v. Genoa*; *Gould v. Sterling*, 23 N. Y. 439, 456) are judicial constructions of a statute of that State, and, therefore, that they furnish a rule by which we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction. But they do not. They are not attempts at interpretation. They would apply as well to the execution of powers or authorities granted by private persons as they do to the issue of bonds under the statute of April 16, 1852. They assert general principles, to wit, that persons empowered to borrow money and give bonds therefor, for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to

the company, — a doctrine denied in this court, in the Supreme Court of Pennsylvania, and even in the Court of Appeals of New York. *People v. Mead*, 24 N. Y. 124; *The Town of Venice v. Breed*, 65 Barb. 597. They assert, also, that where an authority is given to an officer to execute and issue bonds (on the assent of two-thirds of the voters of a town, the assent to be obtained by the officer, and filed in a public office, with an affidavit verifying the assent), the verification amounts to nothing, subverts no purpose, and that a *bona fide* holder of the bonds is bound to prove that the requisite number of voters did actually assent. They assert this as a general proposition. They do not assert that the statute so declares, or that such is even its implied requisition. There is, therefore, before us no such case of the construction of a State statute by State courts as requires us to yield our own convictions of the right, and blindly follow the lead of others, eminent as we freely concede they are." *Infra*, sec. 517.

Where a railroad company procured negotiable bonds to be issued by a town under a statute, which was afterwards declared unconstitutional, and the railroad sold and transferred them to citizens of another State, who, in an action in the Federal court, fixed the liability of the town for the whole issue, it was held that the town had a good cause of action against the railroad company for the amount of the bonds and interest, on the ground that its act in procuring and negotiating the bonds was without authority of law and wrongful. *Town of Plainview v. Winona & St. Peter R. R. Co.*, 36 Minn. 505. The soundness of this conclusion is, perhaps, not so obvious as to prevent reiteration of the question. In *State v. Holladay*, 72 Mo. 499, it was held that where a State court had declared certain bonds issued in aid of a railroad void and the courts of the United States afterwards held them valid, the State court cannot deem them such absolute nullities as not to be the subject of compromise.

<sup>1</sup> *Gelpcke v. Dubuque*, *supra*; *Meyer v. Muscatine* (charter authorizing borrow-



Against such holders it has given no favor to defences based upon mere irregularities in the issue of the bonds or upon non-compliance with preliminary requirements, not going to the question of *power* to issue them.<sup>1</sup> It has held that the circuit courts of the United States were clothed with full authority, by *mandamus* or otherwise, to enforce the collection of judgments rendered therein on such bonds, and that this authority could not be interfered with to the injury of the creditor, either by the legislature or the judiciary of the States.<sup>2</sup> It has upheld and protected the rights of such creditors with a firm hand, disregarding, at times, it would seem, or holding to be inapplicable, principles which it applied in other cases, and asserting the jurisdiction and authority of the Federal courts with such striking energy and vigor as apparently, but perhaps not actually, to trench upon the lawful rights of the States and the acknowledged powers of the State tribunals. Upon the whole, however, there is little doubt that its course has had the approval of the profession in general and of the public, and the result ought to teach municipalities the lesson that if, having the power conferred upon them, they issue negotiable securities, they cannot escape payment if these find their way into the hands of innocent purchasers. Unfortunately, as will presently appear, the decisions upon this important subject in the Supreme Court of the nation and those in some of the State courts are not in all respects harmonious.<sup>3</sup>

*ing of money*), 1 Wall. 384; *Rogers v. Burlington*, 3 Wall. 654; *Van Hostrup v. Madison City*, 1 Wall. 291; *Seybert v. Pittsburg*, *Id.* 272. If the Supreme Court cannot be said to have adopted liberal constructions of statutes authorizing the issue of bonds, it may be indisputably affirmed that it has, in such cases, held the municipality firmly to the practical construction it had put upon the enabling acts.

<sup>1</sup> *Knox County v. Aspinwall*, 21 How. 539; *Moran v. Comm'rs*, 2 Black, 722; *Bissell v. Jeffersonville*, 24 How. 287; *Marsh v. Fulton County*, 10 Wall. 676 (1870); *Louisiana v. Wood*, 102 U. S. 294.

<sup>2</sup> *Von Hoffman v. Quincy*, 4 Wall. 535; *Galena v. Amy*, 5 Wall. 705; *Riggs v. Johnson County*, 6 Wall. 166; *Butz v. Muscatine*, 8 Wall. 575. See, also, *post*, chap. xx. on *Mandamus*, and cases there cited.

<sup>3</sup> The general questions relating to the

*power* to aid railways are considered in a previous chapter. Distinction between municipal "donation" to a railroad company and a municipal "subscription" to its stock. *Hamilton County v. State*, 115 Ind. 64 (1888); s. c. 22 Eng. & Am. Corp. Cases, 108, and note; 15 West. Rep. 329. Reference to decisions construing State statutes authorizing municipal aid to railways, as to requisites of petitions, notice, regularity, and sufficiency of elections, see 22 Eng. & Am. Corp. Cases, 19, note, 47, note, 54, note, 71, note. The United States Circuit Court for the Northern District of Ohio, before *Jackson, J.*, in the case of *Fellows v. Walker*, Auditor, 39 Fed. Rep. 651, refused to enjoin the issue of municipal bonds under an act authorizing the issue of such bonds by the city of Toledo to secure *natural gas* for public and private use. The court considered the object authorized by the act to be a public, as distinguished from a private,

§ 516 (416 a). **Same subject.**— Under the *line of decision in the several States* heretofore adverted to, sustaining the constitutionality of municipal railway aid bonds,<sup>1</sup> millions upon millions of these securities have been issued by townships, counties, and cities in the different States, and sooner or later their issue has been often followed by attempts to escape payment. The misrepresentations which have oftentimes induced the issue of the bonds, and the disappointment arising from the over-estimated benefits of the railroads to the localities which aided their construction, make the attempts to avoid payment of the bonds not unnatural, and more excusable than they would otherwise be. The judicial history of these attempts is found in the law reports of the different States and in those of the Federal tribunals; and a comparison of their judgments shows such a diversity of opinion upon some important questions connected with such securities as to render it most expedient to refer separately to the decisions of the two classes of courts. It is particularly material to notice with some fulness and care the opinions of the Supreme Court of the United States, since, for the reasons above mentioned, the course of this tribunal and of the State tribunals has been such as to draw to the Federal courts in most of the States nearly all of the litigation arising from this source. Wherein the State courts and the Federal courts differ, and wherein they agree, will best appear by referring to some of the principal adjudications.

§ 517 (416 b). **Iowa Municipal Bond Cases.**— In the well-known *Iowa municipal railway aid bond cases*,<sup>2</sup> the bonds were issued *after* the State Supreme Court had affirmed the constitutional power of the legislature to authorize their issue, and *before* the same court had reversed its holding in this respect; and in these cases the Supreme Court of the United States held it was at liberty to take, and

object, and that no sufficient case of clear and irreparable injury was shown to justify the enjoining of the issue of the bonds. *Ante*, chap. vi. sec. 153 *et seq.*

<sup>1</sup> *Ante*, sec. 153 *et seq.*

<sup>2</sup> *Gelpcke v. Dubuque*, 1 Wall. 175 (1865); *Thomson v. Lee County*, 3 Wall. 327 (1865); *Havemeyer v. Iowa County*, *Id.* 294; *Rogers v. Burlington*, *Id.* 654 (1865); *Mitchell v. Burlington*, 4 Wall. 270; *ante*, sec. 516; *Lee County v. Rogers*, 7 Wall. 181 (1868); *Butz v. Muscatine*, 8 Wall. 575. *King v. Wilson*, 1 Dillon C. C. 555 (1871), gives a review of the decisions

of the State and Federal courts upon the subject of municipal railway aid bonds in Iowa. That obligations of contracts cannot be impaired by *subsequent decisions*, see, also, *Chicago v. Sheldon*, 9 Wall. 50; *City v. Lamson*, *Id.* 477 (1869); *County of Randolph v. Post*, 93 U. S. 502; *Am. L. Ins. Co. v. Bruce*, 105 U. S. 328; *Pana v. Bowler*, 107 U. S. 529; *Oregon v. Jennings*, 119 U. S. 74; *Concord v. Robinson*, 121 U. S. 165. The five cases last cited, distinguished in *German Sav. Bank v. Franklin Co.*, 128 U. S. 526 (1888); *Parmlee v. Chicago*, 60 Ill. 267 (1871).

it did take, the view which obtained in the highest judicial tribunal of the State at the time the bonds were issued; and hence it adjudged that the bonds were binding upon and enforceable against the municipalities and counties, although the Supreme Court of the State was at the same time holding that, under the Constitution and laws of Iowa, the bonds were utterly void. Subsequently the Supreme Court of the United States went further, and held that such bonds in the hands of innocent holders are valid, although the State Supreme Court had held otherwise, the latter basing its judgment, however, upon the general principles of the law, and not upon any special and peculiar provision of the Constitution of the State.<sup>1</sup> It seems to be the doctrine of the United States Supreme Court upon this subject, that it is not *concluded* by the decisions of the State courts in any case where they are first made *after* the bonds are issued and have been sold in the markets; and such is undoubtedly its doctrine in all cases relating to this class of securities, where the questions involved do not turn upon the construction of peculiar provisions of the State Constitution and laws.<sup>2</sup> It has not decided that it would hold valid bonds issued *after* the Supreme Court of the State had held them to be invalid, and it would not probably so hold, since such a doctrine is not necessary to protect the innocent owners of such securities, and would involve the consequence of the Federal courts setting up a policy in a State contrary to its Constitution and laws as expounded by its authorized and rightful tribunals.<sup>3</sup>

<sup>1</sup> *Olcott v. Fond du Lac Sup.*, 16 Wall. 678 (1872); *ante*, sec. 511, note.

<sup>2</sup> *Ante*, sec. 515, and note.

<sup>3</sup> *King v. Wilson*, 1 Dillon C. C. R. 555 (1871); *Commercial Bank v. Iola*, 2 Dillon C. C. R. 353 (1873). See, however, on this subject, *Butz v. Muscatine*, 8 Wall. 575 (1869); *Olcott v. Fond du Lac Sup.*, 16 Wall. 578.

Since the text was written the Supreme Court of the United States has distinctly decided, in accordance with the prediction therein, that as to bonds issued after a construction of the State statute by the Supreme Court of the State, such construction is authoritative and binding upon the Federal courts. This subject is fully examined and discussed in *German Sav. Bank v. Franklin County (Ill.)*, 128 U. S. 526, 538 (1888). In this case bonds were issued after the Supreme Court of Illinois had construed the act under which they were issued. Referring to this, Mr. Justice *Blatchford*, giving the opinion of the Su-

preme Court, says: "This interpretation [of the Supreme Court of Illinois] accompanied all bonds subsequently issued into the hands of whoever took them, whether a *bona fide* holder or not. This court must recognize this decision of the Supreme Court of Illinois as an authoritative construction of the statute, made before the bonds [in suit] were issued, and to be followed by this court." *Douglass v. County of Pike*, 101 U. S. 677; *Burgess v. Seligman*, 107 U. S. 20; *Green County v. Conness*, 109 U. S. 104; *Anderson v. Santa Anna*, 116 U. S. 356. In *Douglass v. County of Pike*, *supra*, *Waite*, C. J. (p. 687) says: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself." *Ante*, secs. 511, 515, and notes; *post*, sec. 525, note; *Scotland County v. Hill*, 132 U. S. 107 (1889).

§ 518. (416 c). **General Result stated.** — As preliminary to a more immediate view of some of the leading cases decided by the Supreme Court of the United States upon municipal railway aid securities, it may be observed that the *general result of its decisions* has been very clearly summarized in one of its judgments relating to bonds of this character. "Bonds, payable to bearer," says the learned justice who delivered the opinion of the court, "issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are *valid commercial instruments*; but if issued by such a corporation which possessed *no power* from the legislature to grant such aid, they are invalid, even in the hands of innocent holders. Such a power is frequently conferred *to be exercised in a special manner*, or subject to certain regulations, conditions, or qualifications; but if it appears that the bonds issued show by their *recitals* that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect will not constitute a defence to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which it is alleged was not fulfilled."<sup>1</sup>

It is definitely settled by this court that mere *irregularities* in the exercise of the power will not avail as a defence against an innocent holder for value, and that the only defence open against such a holder is the *want of power to issue the bonds*. Obviously, then, the most important inquiries to be considered are those which relate to the question, *when* the power exists or arises; *who* is to decide whether it existed or had arisen when the bonds were issued; and what will *estop* the corporation which issued them to set up in defence a non-compliance with antecedent or preliminary conditions: and it is these inquiries that we shall seek to illustrate by a reference to the leading decisions of the courts in cases which have arisen for judgment.

**§ 519. Condition precedent to Exercise of Power; Popular Vote; Non-compliance with Condition Precedent; Recital; restraining Is-**

<sup>1</sup> *St. Joseph Township v. Rogers*, 16 Wall. 644 (1872), opinion by *Clifford, J.* In general throughout this work the author has not referred at length in the text to particular cases, but the importance of

this subject, as well as the impossibility of otherwise presenting it with the requisite fulness and accuracy, has induced him to depart to some extent from his usual course.

**sue of Bonds.** — Generally, the power of the municipality, county, or other local civil subdivision of the State, to subscribe for the stock of railway companies, and issue bonds in payment, is conferred upon certain officers, not absolutely but *on the condition of a previous approving popular vote*, or the assent of a majority or of some greater proportion of the resident taxpayers. If this sanction is given, then the officers, by the usual legislation, are authorized to make the subscription and to issue bonds in payment therefor. A very common defence to such bonds consists in a denial that the condition precedent, *i. e.*, the approving vote, the assent of the taxpayers, or whatever else it may be, has, in fact, been complied with; and hence, as contended, the power to issue the bonds did not exist, or never arose.<sup>1</sup>

Where the legislation is of this character, — namely, requiring compliance with some such condition before issuing the bonds, — the Supreme Court of the United States does not hold, as we understand its decisions, that the power can be rightfully exercised unless the condition precedent has been performed. As between the immediate parties, the municipality and the railroad company, doubtless, the inquiry is open, and fully open, whether the condition on which the rightful exercise of the power depends has been complied with; and if it has not been, on due application the issue of the bonds will be enjoined,<sup>2</sup> or if they are in the hands of the original party or of holders with notice, an action to enforce the bonds may, if no estoppel exists, be successfully defended.<sup>3</sup> Want of power is a good defence against a railroad company, endeavoring to enforce by *mandamus* the execution and delivery to it of such bonds by the municipality.<sup>4</sup> In a suit by the payee, or by a person not

<sup>1</sup> Mere informalities in the returns of such an election not prejudicing substantial rights, failing to comply with statutory requirements which are directory only, and clerical errors, will not defeat an appropriation in aid of a railroad. *Irwin v. Lowe*, 89 Ind. 540. Further, as to statutory requirements in respect of municipal bond elections, see *State v. Harris* (Mo.), 23 Eng. & Am. Corp. Cases, 43, 47, note, and cases. In the case of *State v. Harris*, *supra*, the statute of Missouri was construed to require two-thirds of the qualified voters of the county to attend, not merely two-thirds of the votes actually cast. But see *ante*, sec. 44, note, 157, note.

<sup>2</sup> So where a city voted to issue bonds in aid of a railway when the track was

laid and the cars running on sections of ten miles each, "provided, the eastern terminus, general offices, and headquarters of said railroad should be in" the city, the court refused a writ of *mandamus* to compel their issue, for the reason that it did not appear that these conditions had been fulfilled. *State v. Minneapolis*, 32 Min. 501.

As to the duty of enjoining the issue of bonds on the pain of being estopped to set up irregularities in the exercise of the power, see *post*, secs. 547, 548.

<sup>3</sup> *Chambers County v. Clews*, 21 Wall. 317, 321 (1874); *Madison v. Smith*, 83 Ind. 502, approving the text.

<sup>4</sup> *Lamoille Valley R. Co. v. Fairfield*, 51 Vt. 257.

an innocent holder, there is no legal ground for maintaining that the action of the local officers in issuing the bonds, or any recital that they may make therein, will conclude the question whether the condition precedent has been performed; and there is no decision of the Supreme Court of the United States in conflict with this statement of the law, but several which distinctly establish it.<sup>1</sup>

§ 520. **Estoppel by Recital to show Non-compliance with Conditions Precedent; Knox County v. Aspinwall.**—When the bonds have been issued and sold in the market, and before maturity have come for value, and without notice, into the hands of innocent holders, another element of great importance is, according to the doctrine of the Supreme Court, introduced into the transaction, as respects compliance with conditions precedent, — *the element of estoppel*. This is so important in its practical relations to the subject as to require careful and minute consideration. Conceding that the rightful exercise of the power to issue the bonds depends upon a condition precedent, for example, a popular vote in favor of the proposition, *when, how, and by whom is it to be ascertained whether the condition precedent has been performed?* Is it to be ascertained, once for all, before the bonds are issued? Or is it open to inquiry and contestation in every action upon a coupon or bond? Is the municipality estopped, in favor of a *bona fide* holder of the bonds, from setting up this defence? and in what cases will the estoppel be available in favor of the holder? These are grave questions, and cases involving them have been frequently before the Supreme Court, — the first and leading case being *The Commissioners of Knox County v. Aspinwall*.<sup>2</sup>

<sup>1</sup> *Chambers County v. Clews*, *supra*. That court has several times adverted to the duty of the corporation or taxpayer to interfere by injunction to restrain the issue of bonds where the statute has not been complied with. *Injunction lies to restrain issue of bonds* where there has been a material departure from the statute. *Union Pac. R. Co. v. Lincoln County*, 3 Dillon C. C. R. 300 (1873); *Same v. Merriek County*, *Ib.* 359; *State v. Montgomery*, 74 Ala. 226; *McClure v. Oxford Township*, 94 U. S. 429; *Portland & Oxford Central Railroad Co. v. Hartford*, 58 Me. 23. "In cases arising before the issue of the bonds, estoppel has no place, and the sound doctrine is, that compliance with all substantial or material conditions

is essential." *Ib. Ante*, sec. 163, and cases cited.

Where, by statute, the *signature of a particular officer is essential* to the validity of bonds issued in payment of a subscription to railway stock, bonds issued without such signature are not the bonds of the municipality, and recitals in them showing the provisions of the statute and compliance therewith *will not estop* the municipality from denying their validity. *Bissell v. Spring Valley Township*, 110 U. S. 162. Mayor's signature held to be essential; ex-mayor's signature insufficient. *Coler v. Cleburne*, 131 U. S. 162 (1889), noted *ante*, sec. 509, note.

<sup>2</sup> *Commissioners of Knox County v. Aspinwall*, 21 How. 539 (1858). See

§ 521 (417). **The Case of the Commissioners of Knox County v. Aspinwall**,<sup>1</sup> respecting the liability of municipal and public corporations on their negotiable railway aid bonds, deserves to be particularly noticed, as it stands in the order of time at the head of the important line of decisions of the Supreme Court on this subject. The action was by a *bona fide* holder for value of certain coupons attached to negotiable bonds issued by Knox County, Indiana, in payment of a subscription to railroad stock. The defence was that the bonds were not binding upon the county because the county commissioners possessed no power to execute them. By statute, the county commissioners were authorized "to take stock in the railroad, payable in county bonds, such as had been issued, *provided a majority of the qualified voters* of said county, at a designated election, *shall vote for the same.*" The ground upon which the want of power to execute the bonds was placed by the county was the omission to comply with the requirement of the statute in respect to the *notices* for the election (which the statute provided should be held on a fixed day), at which a vote was to be taken for and against a subscription to the stock of the railroad company. It was admitted in the case that the notices, such as the statute prescribed, were not given; and the court seemed to concede "that this would be decisive against the authority of the county to issue the bonds, were it not for the question which underlaid it; and that is, Who is to determine whether or not the election has been properly held, and a majority of the votes cast in favor of the subscription? . . . Is it," the court inquires, "to be determined by the court, in this collateral way, in every suit upon the bond, or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription?" The court was of the opinion, and so decided, that the county commissioners were the proper judges whether or not a majority of the votes in the county had been cast in favor of the subscription to the stock, and whether or not the election had been properly held, and that these questions cannot be determined collaterally in an action upon the bonds or coupons, at least when brought by a *bona fide* holder for value. The court, in assigning the reasons for this holding, speaking through Mr. Justice Nelson, say: "The right of the board [of county commissioners] to act in execution of the authority [conferred by the statute] is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it, would have been a clear violation of duty; and the ascertainment of the

further reference to this case, *infra*, sec. 524, note.

<sup>1</sup> 21 How. 539 (1858).

fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. The board was one, from its organization and general duties, fit and competent to be the depositary of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests. . . . We do not say," he adds, "that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way." <sup>1</sup>

§ 522 (418). **Comments on Knox v. Aspinwall.** — The author ventures to remark that he believes the decision upon the special facts of the case to be right, and for the reasons thus clearly stated by this able and experienced judge. But as sustaining the decision, a further position by way of argument is taken, which, unless it is to be understood in the limited sense herein suggested, he considers to be untenable, of a most dangerous nature, and subversive of an important principle in the law of agency applicable both to private and public agents. That position is this: that a purchaser of the bonds had a right to assume, from the mere fact that they were issued, that the condition on which the county was authorized to issue them had been complied with, and that a *recital* in the bonds that they were issued in pursuance of the statute amounts to *an estoppel in pais* upon the corporation, of which the officers issuing the bonds were the public agents. That this is the position assumed by the court will appear by the following extract: "Another answer," continues Mr. Justice Nelson, "to this ground of defence is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription by the board to the stock of the railroad company and the issuing of the bonds. The bonds, on their face, import a compliance with the law under which they were issued. 'This bond,' we quote, 'is issued in part payment of a subscription of \$200,000, by the said Knox County, to the capital stock, &c., by order of the board of

<sup>1</sup> Commissioners of Knox County v. Aspinwall, 21 How. 539, 544; *infra*, sec. 524, note.



commissioners, in pursuance of the third section of the act, &c., passed by the general assembly of the State of Indiana, and approved Jan. 15, 1849.' *The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power.*"<sup>1</sup> This principle has been reiterated and this case frequently referred to and followed, and one of the two grounds on which it rests, if not indeed both of them, still has the approval of the court, as will be seen by its subsequent judgments.<sup>2</sup>

<sup>1</sup> *Ib.* 545. If by this it is meant that where the power to issue bonds is given upon the condition of a previous majority vote in favor of the proposition, the public or municipal officers can, where in point of fact no vote has been taken or the proposition has been voted down, bind the county by the issue of bonds with false recitals therein, the author feels bound respectfully to insist that, in his judgment, the principle is unsound, and certainly it is one which will entail needless and incalculable injury upon public and municipal corporations. These securities, it is true, are intended to be sold in distant markets, and therefore it cannot reasonably be required that purchasers shall be affected with irregularities, but they ought to be held to ascertain whether the substantial precedent conditions of the power have been, in fact, complied with, and it ought not to be in the power of public officers, unless the decision of this question is by statute expressly or at least plainly committed to them, to bind the corporation for which they act by their mere statements of what is in point of fact untrue.

On grounds similar to those here suggested it has been held by the Supreme Court of *Missouri* that bonds issued where an election is required, but none ever held and no vote taken, are void, because of want of power to issue them,—void in the hands of all persons; but they may be validated by the legislature. *Steines v. Franklin County*, 48 Mo. 167 (1871). *Wagner, J.*, in this case reviews the prior adjudications of the United States Supreme Court and of the Supreme Court of the State of *Missouri*, and limits the language used by the judges to the facts before them, and distinguishes between the case of irregularities in an election and no election whatever. See, also, *Carpenter v.*

*Lathrop*, 51 Mo. 483 (1873). But see text, sec. 524, and cases cited in the next note.

<sup>2</sup> The cases in which *Knox County Comm'rs v. Aspinwall* has been cited and followed or applied, are: *Bissell v. Jeffersonville*, 24 How. 287 (1860); *Woods v. Lawrence County*, 1 Black, 386 (1861); *Moran v. Miami County*, 2 Black, 722, 724 (1862); *Mercer County v. Hackett*, 1 Wall. 83 (1863); *Gelpcke v. Dubuque*, *Ib.* 175, 203; *Van Hostrup v. Madison*, *Ib.* 291; *Meyer v. Muscatine*, *Ib.* 384, 393; *Cincinnati v. Morgan*, 3 Wall. 275; *Rogers v. Burlington*, *Ib.* 654; *Marshall County Sup. v. Schenck*, 5 Wall. 772 (1866); *Lexington v. Butler*, 14 Wall. 284 (1871); *Grand Chute v. Winegar*, 15 Wall. 371 (1872); *Lynde v. Winnebago County*, 16 Wall. 6; *Kenicott v. Jefferson County Sup.*, *Ib.* 452; *St. Joseph Tp. v. Rogers*, *Ib.* 644; *Pendleton County v. Amy*, 18 Wall. 297; *Coloma v. Eaves*, 92 U. S. 484 (1875); *Venice v. Murdock*, *Ib.* 494; *Moultrie v. Rockingham T. C. Sav. Bank*, *Ib.* 631; *Marcy v. Oswego Tp.*, *Ib.* 637; *Humboldt Tp. v. Long*, *Ib.* 642; *Randolph County v. Post*, 93 U. S. 502; *Callaway County v. Foster*, *Ib.* 567; *Leavenworth County v. Barnes*, 94 U. S. 70; *Douglas County Comm'rs v. Bolles*, *Ib.* 104; *Johnson County Comm'rs v. January*, *Ib.* 202; *Same v. Thayer*, *Ib.* 431; *Scotland County v. Thomas*, *Ib.* 682; *East Lincoln v. Davenport*, *Ib.* 801; *Cass County v. Johnston*, 95 U. S. 360; *San Antonio v. Mehaffy*, 96 U. S. 312; *Same v. Barnes*, *Ib.* 316; *Warren County v. Marcy*, 97 U. S. 96; *Macon County v. Shores*, *Ib.* 272; *Nauvoo v. Ritter*, *Ib.* 389; *Daviess County v. Huidekoper*, 98 U. S. 98; *Schnyder County v. Thomas*, *Ib.* 169; *Hackett v. Ottawa*, 99 U. S. 86; *Weyauwega v. Ayling*, *Ib.* 112; *Calhoun*

§ 523. **Author's Statement of Rule.** — Notwithstanding the broad language in some of the opinions, to the effect that where under any

County Sup. v. Galbraith, *Id.* 214; Wilson v. Salamanca, *Id.* 499; Orleans v. Platt, *Id.* 676 (citing among other cases Royal British Bank v. Turquand, 6 El. & Bl. 325); Lyons v. Munson, 99 U. S. 684; Anthony v. Jasper County, 101 U. S. 693; Roberts v. Bolles, *Id.* 119; Pompton v. Cooper Union, *Id.* 196; Douglass v. Pike County, *Id.* 677; Darlington v. Jackson County, *Id.* 688; Foote v. Pike County, *Id.* 688; Menasha v. Hazard, 102 U. S. 81; Ottawa v. Portsmouth Nat. Bank, 105 U. S. 342; Northern Bank v. Porter Tp., 110 U. S. 608 (1883); Cary v. Ottawa, 8 Fed. R. 199; Third Nat. Bank of Syracuse v. Seneca Falls, 15 Fed. R. 783 (1883); Nicolay v. St. Clair County, 3 Dillon, C. C. 163 (1874); Huidekoper v. Buchanan County, *Id.* 175; Mygatt v. Green Bay, 1 Biss. C. C. 292; Smith v. Clark County, 54 Mo. 58, 81; St. Louis v. Shields, 62 Mo. 247; Wilkinson v. Peru, 61 Ind. 1; Black v. Cohen and Shorter v. Rome, 52 Ga. 621 (1874); Webb v. Herne Bay Comm'rs, L. R. 5 Q. B. 642; *In re* Imperial Land Co. of Marseilles, L. R. 11 Eq. 478; Bargate v. Shortridge, 5 Cl. H. L. C. 297; and a certificate of the proper officer that the bonds have been duly issued and the signatures are genuine, and that the same have been duly registered in his office according to law, cannot be contradicted by evidence that there was actually no registration in his office. Rock Creek Tp. v. Strong, 96 U. S. 271.

Estoppel to set up irregularities in issue of bonds by reason of the subsequent payment of interest. Marshall County Sup. v. Schenck, 5 Wall. 772; compare Marsh v. Fulton Co., 10 Wall. 676; Eminence v. Grasser's Exrs., 81 Ky. 52; Aroma v. Auditor, 15 Fed. Rep. 843; Oswego First Nat. Bank v. Walcott, 7 Fed. Rep. 892; Whiting v. Potter, 2 Fed. Rep. 517; Parkersburg v. Brown, 106 U. S. 487; see also Portsmouth Sav. Bank v. Springfield, 4 Fed. Rep. 276.

*Estoppel by former final judgment on demurrer*: Where, in an action upon coupons from bonds issued in aid of a railway, a final judgment in favor of the municipality was entered upon plaintiff's demurrer

to its answer setting up facts showing that the bonds were *never executed by it*, the plaintiff was held to be estopped to deny the matters so determined when suing the same municipality upon other coupons from the same bonds subsequently maturing. Bissell v. Spring Valley Township, 124 U. S. 225; compare Cromwell v. Sac County, 96 U. S. 51. The former action of Bissell on *other coupons of the same issue of bonds* is reported in 110 U. S. 162. After the opinion of the Supreme Court in the case of the same plaintiff (reported 124 U. S. 25) had been printed, and during the term, the author, having been employed as counsel for the plaintiff, filed a petition and argument for a rehearing of the opinion holding the judgment in the former action to be an estoppel. He urged, upon an examination of the pleading in the first record, (a) that it was *not* adjudged therein that the bonds were never signed by the proper officer, but that it was only adjudged that if the bonds were registered and purchased by the plaintiff, as alleged in his petition, this is in law no answer to the plea that the clerk did not sign the bonds or authorize any one else to sign them for him; (b) that the adjudication in the first suit is no bar to a suit upon *other* coupons when the plaintiff proposes to establish as a fact for the first time that the clerk, being ill, did authorize the bonds to be signed in his name by his brother, who was also his deputy, and that they were signed accordingly. The petition for a rehearing was overruled, and no further opinion was filed. The importance and difficulty of the question seem to justify this further statement concerning the cause which does not appear in the reports. The extent to which the doctrine of estoppel is *seemingly* carried in this case, the author suggests with deference, goes beyond the line of the principle of previous adjudications in the same court, and to an extent which deserves further consideration as to its soundness.

Estoppel by retaining proceeds of bonds. Pendleton County v. Amy, 13 Wall. 297 (1871). *Post*, sec. 547.

circumstances the *power* exists in the corporation to issue negotiable securities, the *bona fide* holder has the right to presume that they were duly issued, yet when the *facts* of the cases in which such language is used are considered, we are unable, after a careful review of the decisions of the Supreme Court, to say that they lay down the doctrine that *merely* by recital in the bonds the corporation will, under all circumstances, in favor of an innocent holder, be estopped from showing that in point of fact no election whatever was holden, or that any other condition precedent to the exercise of the power has not been complied with. If upon a true construction of the legislative enactment conferring the authority, the corporation or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their recital of their determination of a matter *in pais* which they are authorized to decide will, in favor of the bondholder for value, bind the corporation.<sup>1</sup>

§ 524. **Qualification of last Section by the Supreme Court.** — "This," says Mr. Justice Strong, in *Coloma v. Evans*, referring to the language of the author in the last preceding section, "is a very cautious statement of the doctrine" of the Supreme Court. And he adds, "It may be re-stated in a slightly different form. Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide

<sup>1</sup> The language in this section stands as in a previous edition; but it must now be regarded as authoritatively qualified by the judgment of the Supreme Court of the United States, referred to in section 524. See *Oregon v. Jennings*, 119 U. S. 74, where Mr. Justice *Blatchford* said, "The supervisor and town clerk . . . were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with." In this case the terms of the vote were that the bonds should not be issued

and the vote should be void unless the road should be completed by a specified day, and the bonds specially recited that it was so completed, though the fact was otherwise. *Oregon v. Jennings* was distinguished in *German Savings Bank v. Franklin County*, 128 U. S. 526, 543 (1888).

That bonds recite, as the authority for the issue, a *wrong act of the legislature*, does not necessarily invalidate them, if it can be shown that they were in fact issued under an act conferring the power. *Anderson Co. Comm'rs v. Beal*, 113 U. S. 227; *Johnson Co. Comm'rs v. January*, 94 U. S. 202, distinguished; *Crow v. Oxford*, 119 U. S. 215 (1886).

whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal.<sup>1</sup> In *Bissell v. Jeffersonville*, it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the *petition of three-fourths of the legal voters of the city*. The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value, to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription. A similar ruling was made in *Van Hostrup v. Madison City*, and in *Mercer County v. Hackett*. The same principle has recently been asserted in this court, after very grave consideration, and it must be considered as settled. In *St. Joseph Township v. Rogers*, it is stated thus: 'Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears by their recitals that the bonds were issued in conformity with such regulations and pursuant to such conditions and qualifications, proof that any or all these recitals were incorrect will not constitute a defence for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification, which it is alleged was not fulfilled.' There

<sup>1</sup> The proposition here stated has been re-asserted and applied in subsequent cases. *Anderson County v. Beal*, 113 U. S. 227; *Dixon County v. Field*, 111 U. S. 83; *Northern Bank of Toledo v. Porter Tp.*, 110 U. S. 608; *Buchanan v. Litchfield*, 102 U. S. 278; *Lane v. Embden*, 72 Me. 354; *Anderson Co. v. Houston & G. N. R. R. Co.*, 52 Tex. 228; *Carrier v. Shawangunk*, 10 Fed. Rep. 220; *Hopper*

*v. Covington*, 8 Fed. Rep. 777; *Irwin v. Town of Ontario*, 3 Fed. Rep. 49; *Phelps v. Lewiston*, 15 Blatchf. 131. On the other hand a recital of facts which the officers had no authority to determine, or a recital of matters of law, will not estop the municipal corporation. *Dixon County v. Field*, 111 U. S. 83; see this case, *post*, sec. 529 a, note.

is nothing in the case of *Marsh v. Fulton County* at all inconsistent with the rule thus asserted. In that case *there were no recitals* in the bonds, and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open. What we have said disposes of the present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown; and even if it had been admissible, the effort to assimilate the case to *Marsh v. Fulton County* would fail. There the subscription was for the stock of a different corporation from that for which the people had voted.”<sup>1</sup>

<sup>1</sup> *Town of Coloma v. Eaves*, 92 U. S. 484. In this case, legislative authority was given to the town to make the subscription and issue the bonds on the previous sanction of a popular vote, to be ascertained, as the court construed the enactment, by the officers of the town, who were empowered to execute the bonds. The bonds were executed in due form by the proper officers, and duly registered with the auditor of State. They contained the recital that they “*are issued under and by virtue of the act incorporating the railroad company*,” approved March 24, 1869, “*and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law.*”

The scope and effect of the doctrine of the court are shown by the brief separate opinion in the case, given by Mr. Justice Bradley, who says:—

“I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of *Knox County v. Aspinwall*, to wit, that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance. If, when the law requires a vote of taxpayers before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute and who does execute the bonds; and if the bonds themselves con-

tain a statement or recital that such vote has been given, then the *bona fide* purchaser of the bonds need go back no further. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It may be *prima facie* sufficient; but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject, and I do not think that the contrary has ever been decided by this court. There have been various *dicta* to the contrary, but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bonds, according to my view of the case. This view was distinctly announced by this court in the case of *Lynde v. The County of Winnebago*, 16 Wall. 6. In the case now under consideration, there is a sufficient recital in the bond to show that the proper election was held and the proper vote given; and the bond was executed by the officers whose duty it was to ascertain these facts. On this ground, and this alone, I concur in the judgment of the court.”

In the same case Mr. Justice Strong, in the main opinion, after resting the judgment on the principle stated in the text (sec. 524), makes this reference to the case of *Knox County v. Aspinwall*:—

“Indeed, some of our decisions have gone farther. In the leading case of *Knox County v. Aspinwall*, 21 How. 544, the decision was rested upon two grounds. One of them was that the mere issue of

§ 525. **Estoppel by Recital; Failure to give Notice of Election, or Notice for the Required Time.** — As showing the application and effect of the doctrine stated in the preceding sections as to compliance with conditions precedent, — particularly in respect of the very common one of a previous election, or the assent of a given proportion of the taxpayers, — a brief reference may be made to some of the leading decisions of the Supreme Court, in which it is evident that the whole subject again underwent thorough consideration. In *Humboldt Township v. Long*, bonds issued under legislative authority, requiring a popular vote at an election of which thirty days' notice was to be given, and which contained a recital (made by the officers having the power, *as construed*, to determine whether the conditions of fact had been complied with, and to issue the bonds) to the effect that they were "issued *in pursuance of and in accordance with the act of the legislature*," stating

the bonds, containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with, and it was said the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to *The Royal British Bank v. Turquand*, 6 Ellis & Blackburn, 327, a case in the Exchequer Chamber which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in *Knox County v. Aspinwall* has been more than once reaffirmed in this court. It was in *Moran v. Miami County*, 2 Black, 732; in *Mercer County v. Hackett*, 1 Wall. 83; in *Supervisors v. Schenck*, 5 Wall. 784, and in *Meyer v. Muscatine*, 1 Wall. 384. It has never been overruled, and whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox County v. Aspinwall*. That, we think, has been so firmly seated in reason and authority that it cannot be shaken."

In further explanation we may add that the *recital* in *Knox County v. Aspinwall* was in these words: "This bond is

issued in part payment of a subscription of \$200,000, by the said Knox County, to the capital stock, &c., by order of the board of commissioners, *in pursuance of* the third section of the act, &c., approved January 15, 1849." The act required the previous sanction of a majority of the qualified voters of the county, and the defence was failure to comply with the statute in respect to the *notices* for the election. And the proposition which has been doubted elsewhere, and from which Mr. Justice *Bradley* dissents, is contained in the following sentence, extracted from the opinion of Mr. Justice *Nelson* in that case, who, after quoting the foregoing recital in the bond (which, it will be seen, does not *expressly* state that there was an election), says: "The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power." In *Moran v. Miami County*, 2 Black, 722, 732, the court say: "We think and adjudge that the recitals in the bonds are conclusive [of compliance with the precedent condition], constituting an estoppel *in pais* upon the defendants in this suit." Other cases to the same effect in the Supreme Court will be adverted to as we proceed. In *Marcy v. Oswego Township*, 92 U. S. 638 (1875), the doctrine as contained in the text (sec. 524), was reasserted almost in the same language.

it, were held not to be invalid in the hands of a holder for value, before due, without notice, *because the election was held within less than thirty days* after the date of the order providing for it.<sup>1</sup> The principle adopted, and the reasoning of the court by which it is sustained, lead, it would seem, logically to the conclusion (although there is, perhaps, no case in the Supreme Court where the *facts* required a direct decision of the point) that, where the power to issue the bonds is given upon the condition of a previous vote in favor of the proposition, the public or municipal officers can, *where no vote whatever has been taken, or the proposition has been voted down*, bind the county or municipality by the *false recitals* in such unauthorized bonds, provided they are issued by the officers entrusted by the statute with the power. Under such a doctrine, limitations upon the exercise of the power, intended to prevent fraud, and to secure a compliance with the conditions upon which the bonds are authorized, are of little practical value, and will frequently prove illusory. So, in *Coloma v. Eaves*, *supra*,<sup>2</sup> — a case

<sup>1</sup> *Humboldt Township v. Long*, 92 U. S. 642. The court thus state the ground of its decision: "The board of county commissioners, who caused the bonds to be issued, were constituted the authority to determine whether the conditions of fact, made by the statute precedent to the exercise of the authority granted to execute and issue the bonds, had been performed, and their recital in the bonds issued by them is conclusive in a suit against the township brought by a *bona fide* holder." (So held, also, in *Marcy v. Township of Oswego*, 92 U. S. 638.) "In so ruling we but decided what had often before been decided, and what ought to be regarded as a fixed rule. Applying it to the solution of the question now before us, it is plain that the bonds are not invalid because *all the notice* of the popular election was not given which the legislative act directed. The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted, with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription, and conse-

quent bond issue, were questions which the law submitted to the board of county commissioners, and which it was necessary for them to answer before they could act. In the present case the board passed upon them and issued the bonds, asserting by the recitals that they were issued 'in pursuance of and in accordance with the act of the legislature.' Thus the plaintiff below took them, without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments." See *Town of Elmwood v. Marcy*, 92 U. S. 289 (1875); *St. Joseph Township v. Rogers*, 16 Wall. 644 (1872); *Anderson Co. Comm'rs v. Beal*, 113 U. S. 227; *Lincoln v. Cambria Iron Co.*, 103 U. S. 412; *American L. Ins. Co. v. Bruce*, 105 U. S. 328, distinguished in later case of *German Sav. Bank v. Franklin County*, 128 U. S. 526, 541 (1888). *Ante*, sec. 517, note.

<sup>2</sup> 92 U. S. 484; followed in *Pana v. Bowler*, 107 U. S. 529; last case distinguished in *German Sav. Bank v. Franklin County*, 128 U. S. 526. See *Rouede v. Jersey City*, 18 Fed. Rep. 719.

from Illinois, — where the local officers of the town were empowered by the statute to issue bonds, provided a majority of the voters of the town voted for the subscription, — which fact, the statute provided, shall appear by the statement of the town-clerk, filed with the county clerk, showing the vote given, the amount voted, and the rate of interest; it was held, in favor of a *bona fide* owner of the bonds issued containing a recital of an election, that such an owner need not look beyond the recitals made in the bonds by the local officers authorized to issue them for evidence of the existence of the facts *in pais* thus recited, the decision and declaration of that decision in the bonds being conclusive upon the town. The court said: "After all, this is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue have been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided and certified their decision. They have declared the contingency to have happened on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision, and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency, but whether that has happened or not is a question of fact, the decision of which is by the law confided to others, to those most competent to decide it, and which the purchaser is, in general, in no condition to decide for himself." The Supreme Court, while asserting its adherence to the previous decisions on this subject, has declared its unwillingness to enlarge or extend them.<sup>1</sup>

<sup>1</sup> Recitals by officers invested with authority to determine whether precedent conditions have been performed, that the bonds have been issued "*in pursuance of*," or "*in conformity with*," or "*by virtue of*," or "*by authority of*," the statute, have been held, in favor of *bona fide* purchasers for value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions have been performed before the bonds were issued. "But in all such cases, as a careful examination will show, the recitals fairly imported a compliance, in all substantial respects, with the statute giving author-

ity to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions." Mr. Justice Harlan, *School District v. Stone*, 106 U. S. 183; see also *Moulton v. Evansville*, 25 Fed. Rep. 382. A recital that bonds are issued "*under*" the provisions of a certain statute simply asserts that they are subject to or controlled by the statute, and puts a purchaser upon notice to acquaint himself with its provisions and limitations. In this case the municipality was held not to be estopped from showing that the bonds were void for conflicting with a constitutional provision



§ 526. **Condition Precedent; Onus Probandi; Estoppel by Recital.**—In another important case, it appeared that legislative authority was given to certain officers of a town to borrow money to aid the building of a railway, and to issue bonds therefor, *provided the written assent of two-thirds of the resident taxpayers should be previously obtained by said town officers, and filed in the county clerk's office, with an affidavit of such officers verifying such assent.* A list of assenting taxpayers was filed in the clerk's office, and also the required affidavit; bonds were issued, and were in the hands of a holder for value: on the trial the question arose whether the plaintiff must prove the signatures to the assent to be genuine, and it was held by the Supreme Court of the United States, denying *Starin v. Genoa*, and *Gould v. Sterling*, cited in the note, that no such *onus* rested on him; that the town officers were created a tribunal to determine whether two-thirds of the resident taxpayers had assented, and that on their decision the purchaser might rely, without looking further; and that the town was concluded, in favor of an innocent holder, from denying that the condition precedent had been performed.<sup>1</sup>

limiting municipal indebtedness, which was also contained in the statute. *Bates v. Independent School District*, 25 Fed. Rep. 192. As to effect of the constitutional provision in such case, see *infra*, sec. 529 *a*. A recital that bonds were issued "in pursuance of law" was held not to estop the town from showing that it did not have a population large enough to be within the terms of a certain act, it not appearing that the officers issuing the bonds were required by law to ascertain the population. *Kelly v. Town of Milan*, 21 Fed. Rep. 842; but compare with *School District v. Stone*, *supra*. Where bonds are issued under proper authority, with recitals showing that they conformed to the requirements of the statutes authorizing their issue, and that the city was liable for them, the city is estopped as against an innocent holder for value from showing that it had imposed conditions upon its liability, even when the statute provided for conditions, and that the bonds should not be binding until the conditions were performed. *Am. L. Ins. Co. v. Bruce*, 105 U. S. 328. But this case, on the ground that its recital of compliance with the statute was specific, and on the further ground that the bonds were issued prior to the decision of the

Supreme Court of the State adversely construing the statute, was distinguished in *German Sav. Bank v. Franklin County*, 128 U. S. 526, 541 (1888).

<sup>1</sup> *Venice v. Murdock*, 92 U. S. 494 (1875); *Rock Creek Tp. v. Strong*, 96 U. S. 271; *Mobile Sav. Bank v. Oktibeha Co. Sup.*, 24 Fed. Rep. 110; *McCall v. Hancock*, 10 Fed. Rep. 8; *Montclair v. Ramadell*, 107 U. S. 147 (deciding also that a holder of bonds is presumed to have acquired them for value and in good faith; and that when in a suit upon them it is necessary for him to show that value was paid, his title will be sustained if he proves that any previous holder paid value). In *The People v. Mead*, 36 N. Y. 224 (1867), the decision in *Starin v. Genoa* and *Gould v. Sterling*, referred to in the text, was adhered to by the Court of Appeals of New York, although the court admitted it was contrary to the decisions of the Supreme Court of the United States as to the evidence of the assent of the taxpayers. In *Venice v. Murdock*, *supra*, Mr. Justice Strong, speaking of *Starin v. Genoa* and *Gould v. Sterling*, says: "These decisions are in conflict with the rulings of this court in *Bissell v. Jeffersonville*, 24 How.

**§ 527. Estoppel by Recital to set up Defence of an Over-issue contrary to the Enabling Act.**—Among the limitations, or attempted limitations, upon the exercise of the power to issue

287; *Knox County v. Aspinwall*, 21 How. 539; *Mercer County v. Hackett*, 1 Wall. 83, and other cases which we have cited. They are in conflict also with decisions in other State courts. *Society for Savings v. New London*, 29 Conn. 174; *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395; *Knox County Commissioners v. Nichols*, 14 Ohio St. 260. We have carefully considered the reasons given for the judgments in the *New York* cases, without being convinced by them. They ignore the paramount purpose for which the bonds were authorized by the legislature, and they treat the written assent of the taxables as the authority to the township officers, when, in fact, the power was given by the legislature, and it was only left to the town to determine by the action of two-thirds of the resident taxables whether the supervisors and commissioners might act under the power. In *Gould v. Sterling* the legislative act required no affidavit to be filed with a statement of the assenting taxpayers, and in *Starin v. Genoa* the affidavit filed was regarded as merely verifying that the persons whose names appeared on the assents comprised two-thirds of all the resident taxpayers. But it is obvious that if no more than this was meant by the required affidavit, it was wholly useless, for the assessment rolls of the township would have shown as much." The case, *Venice v. Murdock*, is so important in overturning, so far as the Federal courts are concerned, the judgment of the Court of Appeals of *New York*, and as respects the proposition it establishes, that we reproduce the additional reasons given by the Supreme Court in support of its judgment. "It is very obvious," says *Strong, J.*, "that if the act of the legislature which authorized an issue of bonds in aid of the construction of the railroad on the written assent of two-thirds of the resident taxpayers of the town, intended that the holder of the bonds should be under obligation to prove by parol evidence that each case of the two hundred and fifty-nine names signed to the

written assent was a genuine signature of the person who bore the name, the proffered aid to the railroad company was a delusion. No sane person would have bought a bond with such an obligation resting upon him whenever he called for payment of principal or interest. If such was the duty of the holder, it was always his duty. It could not be performed once for all. The bonds retained in the hands of the company would have been no help in the construction of the road. It was only because they could be sold that they were valuable. Only thus could they be applied to the construction. Yet it is not to be doubted the legislature had in view and intended to give substantial aid to the railroad company, if a sufficient number of the taxpayers assented. They must have contemplated that the bonds would be offered for sale, and it is not to be believed they intended to impose such a clog upon their salableness as would rest upon it if every person proposing to purchase was required to inquire of each one whose name appeared to the assent whether he had in fact signed it." In later cases the Court of Appeals adheres to its position. *Cagwin v. Town of Hancock*, 84 N. Y. 532; *Town of Lyons v. Chamberlain*, 89 N. Y. 578; *Craig v. Town of Andes*, 93 N. Y. 405; *infra*, sec. 550, note. In a suit by taxpayers to declare void bonds issued in aid of a railroad, on the ground that conditions precedent had not been complied with, *the burden of proof* is upon the plaintiffs. *Connor v. Green Pond, W. & B. R. R. Co.*, 23 S. C. 427. Where the validity of a subscription depends upon its ratification "by a majority of the taxpayers," proof of that fact, in a suit upon bonds which recite that they were issued in payment of the subscriptions, may be made by the poll books and the proceedings of the council, showing the result by a certificate of the election officers. It is not necessary to prove that each person voting was a lawful voter. *Hannibal v. Fauntleroy*, 105 U. S. 408.

bonds, one not unfrequently provided is that the amount voted or issued shall not exceed a specified proportion of the taxable property of the municipality, or such a sum as will require a greater levy of taxes than a specified rate on the taxable property to pay the annual interest on the bonds. The effect of a disregard of a statutory limitation of this character by the officers entrusted by the statute with the exercise of the power came, for the first time, before the Supreme Court in 1875, in a case arising under the legislation of Kansas.<sup>1</sup>

<sup>1</sup> *Marcy v. Township of Oswego*, 92 U. S. 637. The legislative provision is essential to an accurate understanding of the opinion and judgment of the court. The act of the legislature, under which the bonds purported to have been issued, was passed February 25, 1870. Laws of Kan. 1870, p. 189. The first section enacted that whenever fifty of the qualified voters, being freeholders, of any municipal township in any county, should petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in the name of such township, in any railroad proposed to be constructed into or through the township, designating in the petition, among other things, the amount of stock proposed to be taken, it should be the duty of the board to cause an election to be held in the township to determine whether such subscription should be made; *provided that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent per annum on the taxable property of such township to pay the yearly interest.* The second section directed the board of county commissioners to make an order for holding the election contemplated in the preceding section, and to specify therein the amount of stock proposed to be subscribed, and also to prescribe the form of the ballots to be used. The fifth section enacted that if three-fifths of the electors voting at such election should vote for the subscription, the board of county commissioners should order the county clerk to make it in the name of the township, and should cause such bonds as might be required by the terms of the vote and subscription to be issued in the name of such township, to be signed by

the chairman of the board, and attested by the clerk under the seal of the county.

In *Marcy v. Township of Oswego*, *supra*, the bonds to which the coupons were attached contained the following recital: "This bond is executed and issued by virtue of, and in accordance with, an act of the legislature of the said State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25, 1870,' and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said township of Oswego, at a special election duly held on the 17th day of May, A. D. 1870." Each bond also declared that the board of county commissioners of the county of Labette, of which county the township of Oswego is a part, had caused it to be issued in the name and in behalf of said township, and to be signed by the chairman of the said board of county commissioners, and attested by the county clerk of the said county, under its seal. Accordingly, each bond was thus signed, attested, and sealed. The bonds were registered in the office of the State auditor, and certified by him in accordance with the provisions of an act of the legislature. His certificate on the back of each bond declared that it had been regularly and legally issued; that the signatures thereto were genuine, and that it had been duly registered in accordance with the act of the legislature.

The defence to the bonds was that there had been an *overissue*, contrary to the statute. The bond, it will be observed, contains no statement on this point; but it was held by the Supreme Court that the above quoted recital in the bonds estopped

§ 528. **Same subject.** — In the case referred to in the last section — *Marcy v. Township of Oswego*, — the bonds were duly executed, and contained a *recital* of the act, and that they were issued “*in virtue of and in accordance*” with it, and “*in pursuance of and in accordance with the vote* of three-fifths of the legal voters of the township, at an election held on” a specified day. The plaintiff was a *bona fide* holder for value, without notice. The defence was that the bonds were voted and issued at one time, as one act, and in payment of one subscription, *in excess* of the amount author-

the township from making this defence against a *bona fide* holder.

The case of *Marcy v. Township of Oswego* was cited and approved in *Humboldt Township v. Long*, 92 U. S. 642, the court observing :—

“There is no essential difference between this case and that. The assessment rolls of the township may have been proper evidence for the consideration of the board of county commissioners when they were inquiring what the value of the taxable property of the township was, but the bonds are not invalid in the hands of a *bona fide* holder by reason of their having been voted and issued in excess of the statutory limit, as shown by the rolls. Whatever may be the right of the township, as against those who issued the bonds, it cannot be set up against a *bona fide* holder of the bonds that the amount issued was too large, in the face of the decision of the board, and their recital that the bonds were issued pursuant to and in accordance with the act of 1870.” Compare *Daviess County v. Dickinson*, noted *infra*, and see *Sherman County v. Simons*, 109 U. S. 735 ; *Potter v. Chaffee Co. Comm’rs*, 33 Fed. R. 614. *Recitals* in bond held, in favor of a *bona fide* holder, to estop the debtor municipality to set up that the bond was issued in excess of the amount authorized by statute. *New Providence v. Halsey*, 117 U. S. 336 (1885), a New Jersey case, in which the court follows the decision on this point in *Cotton v. New Providence*, 47 N. J. L. 401, and *Mutual Benefit Life Ins. Co. v. Elizabeth*, 42 N. J. L. 235. *Bergen Co. Freeholders v. Mer. Ex. Nat. Bank of N. Y.* 12 Fed. Rep. 743. See also *supra*, sec. 525, and note ; *post*, sec. 529 a. *Negotia-*

ble bonds containing no recitals, actually issued in excess of the number of bonds authorized by the act, and as security for the personal debt of a fiscal officer of the corporation to the original holder, are not binding upon the corporation. *Merchants’ Bank v. Bergen County*, 115 U. S. 384 (1885). Bonds were voted to the amount of \$250,000 ; but the presiding judge and clerk of the county court issued without power to do so bonds in excess of that amount. The bonds contained no recital on their face as to the Act under which they were issued, but each bond had a certificate thereon, signed by the county judge only, that it was issued as authorized by the statute (naming it) and by an order of the county court in pursuance thereof. It was held that the bonds *in excess of the* \$250,000 were void in the hands of even *bona fide* holders for value, for want of power to issue them, and that the county was not estopped ; that the bonds to the amount of \$250,000 which were valid were the bonds which were *first* delivered. *Daviess County v. Dickinson*, 117 U. S. 657 (1885). Where bonds were issued by a municipal corporation to fund a debt part of which only was in excess of the constitutional limitation, it was held to be an entire and indivisible transaction, and that *the whole issue of bonds was void*. On this point the court says : “It is impossible to distinguish the valid from the invalid portion of the debt secured by the bonds ; the transaction involved in the issue of the bonds was entire and indivisible, and therefore the whole is invalid.” *Millerstown Bor. v. Frederick*, 114 Pa. St. 435, 441. Compare *Daviess County v. Dickinson*, *supra*. *Infra*, secs. 528, 529, 529 a.

ized by the statute. The circuit justice of the United States for the circuit distinguished the case from *Knox County v. Aspinwall*, before referred to, on the ground that the statute imposing the limitation, the order for the election, the proposition submitted, the order for the issue of the bonds, and the latest assessment roll were not, properly, matters *in pais*, but were all public, all open, all accessible, and all of record, and if consulted by the purchaser would have shown the bonds to have been voted and issued in violation of the express limitation upon the power contained in the statute. But the judgment of the circuit court was reversed, three judges dissenting, and the defence held unavailing. The case was considered to fall within the principle of the previous decisions. Mr. Justice Strong, speaking for the court, after stating the facts as we have given them, observed: "In view of these facts, and of the decisions heretofore made by this court, the question cannot be considered an open one. We have recently reviewed the subject in the case of *The Town of Coloma v. Eaves* [*supra*], and reasserted what had been decided before; namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary condition precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted."<sup>1</sup>

<sup>1</sup> In the dissenting opinion of Mr. Justice *Miller* (with whom concurred *Davis* and *Field*, JJ.), the view of the court is strongly combated. A few extracts will show the opinion of the dissentients, and bring into clearer relief the views of the court:—

"In the cases under consideration," says *Miller*, J., "this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds, and of the taxable property of the towns, is given in these cases with exact-

ness, but I do know that in some of the cases tried before me last summer in *Kansas* it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax list of the year preceding the issue. This court holds that such a showing is no defence to the bonds, notwithstanding the express prohibition of the legislature. It is therefore clear that, so long as this doctrine is upheld, it is not in the power of the legislature to authorize these corporations to

§ 529. **Same subject.** — The cases referred to in the last two sections afford, perhaps, a more striking illustration than any pre-

issue bonds under any special circumstances, or with any limitation in the use of the power, which may not be disregarded with impunity. It may be the wisest policy to prevent the issue of such bonds altogether. But it is not for this court to dictate a policy for the States on that subject. The result of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a State constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual. . . . No such principle has ever been applied by this court, or by any other court, to a State, to the United States, to private corporations, or to individuals. I challenge the production of a case in which it has been so applied. In the Floyd Acceptance Cases, 7 Wall. 666, in which the Secretary of War had accepted time drafts drawn on him by a contractor, which, being negotiable, came into the hands of *bona fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual cannot be so limited as to make any one dealing with the agent bound by the limitation, or that the agent's construction of his power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open and notorious, bind the corporation which he professes to represent. The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers. It is that, whenever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the lim-

itation upon the exercise of the power has been complied with; and especially and particularly if they make a *false recital* of the fact on which the power depends, in the paper they issue, this false recital has the effect of creating a power which had no existence without it. This remarkable result is always defended on the ground that the paper is negotiable, and the purchaser is ignorant of the falsehood. But in the Floyd Acceptance Cases, this court held, and it was necessary to hold so there, that the inquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed, it could not be aided by giving the paper that form. In county bonds it seems to be otherwise. In that case the court held that the party taking such paper was bound to know the law as it affected the authority of the officer who issued it. In county bond cases, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express provisions, is still valid. There is no reason in the nature of the condition on which the power depends in these cases, why any purchaser should not take notice of its existence before he buys. The bonds in this case were issued at one time, as one act, of one date, and in payment of one subscription. All this was a matter of record in the town where it was done.

“So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued, is of record both in that town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township clerk or the county clerk to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held that before buying these bonds the purchaser must look to those matters on which their validity depended. They are all public,

viously decided by that court, that the *purchaser may implicitly rely upon the recitals in the bonds* made by the proper officers, that the authority to issue them has arisen, and that he is under no obligation to consult the records of the municipality, and is not charged with constructive notice of their contents; and this, too, it will be observed, where the recital in the bonds was general and not specific in its nature, and where the facts which would have shown the issue of the bonds to have been illegal were matters appearing upon the public records of the township.<sup>1</sup>

**§ 529 a. No estoppel by Recital to set up Defence of an Overissue contrary to a Constitutional Limitation.** — Peremptory constitutional provisions that municipalities shall not issue bonds exceeding a specified percentage on the value of the taxable property within the municipality, to be ascertained by the official assessments or valuations for the purposes of taxation, are regarded by the Supreme Court of the United States, as well as by the State tribunals, as fixing a limit beyond which *the power to issue bonds* cannot be legislatively conferred; and the Supreme Court holds, that if bonds

all open, all accessible [see on the point, sec. 529 a, *post*, and note, and sec. 549, and note], — the statute, the ordinance for their issue, the latest assessment roll. But in favor of a purchaser of municipal bonds, all this is to be disregarded; and a debt contracted without authority and in violation of express statute is to be collected out of the property of the helpless man who owns any in that district. I say 'helpless' advisedly, because these are not *his* agents. They are the officers of the law, appointed or elected without his consent, acting contrary, perhaps, to his wishes. Surely if the acts of any class of officers should be valid only when done in conformity to law, it is those who manage the affairs of towns, counties, and villages, in creating debts which not they, but the property-owners, must pay. . . . It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market, they must pay them when they become due. But it is another thing to say that when an officer created by the law exceeds the authority which that law confers upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he

had no part whatever in their issue and no power to prevent it. This latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market. If one of two innocent persons must suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose, rather than the property-holder, who might not know anything of the matter, or if he did, had no power to prevent the wrong." See, also *Lewis v. Barbour Co.* Comm'rs, 3 Fed. Rep. 191, notes; *infra*, sec. 531, note. Compare with later case of *Daviess County v. Dickinson*, 117 U. S. 657 (1885), *supra*, sec. 527, note.

<sup>1</sup> The author allows this section to stand as in the last edition. The Supreme Court has not yet overruled the propositions therein stated, but it has reached a different result where the overissue is in violation of a *constitutional* provision, as will appear by the next section (529 a), and the cases there cited.

be issued in excess of such limit, they are void in the hands of *bona fide* holders, notwithstanding a recital therein that they are issued *under and in pursuance of the Constitution of the State*, inasmuch as such recital will not estop the municipality from showing that the bonds were issued in violation of the constitutional limitation; and if this be shown the plaintiff cannot recover, though he be a holder for value and without actual notice of any over-issue;—at least, this was so held in a case where the bond itself showed on its face the total aggregate issue of bonds, and where the issue was in such an amount as that if compared with the assessment roll (itself a public record, which everybody is bound to notice), the fact of overissue would appear upon inspection or by arithmetical calculation. The cases on this subject in the note arising under constitutional limitations, were distinguished on the grounds specially stated from previous cases where the innocent holder of the bond was allowed to recover, notwithstanding the bond had been issued in excess of a *statutory limitation* of a similar character.<sup>1</sup> Constitutional provisions of this kind are of recent origin, and were ordained the more effectually to prevent the creation of extravagant municipal indebtedness. The Supreme Court doubtless felt, and we think justly felt, the force of the consideration that if the doctrines of that court in respect of the estoppels created by recitals in a bond were extended to the question of the amount or extent of municipal indebtedness, at least in cases where such amount could be ascertained by reference to a public record, if not indeed in all cases, would be to defeat or render practically worthless the very purpose of the constitutional provision,—a purpose deemed so important that it is embodied in the organic law.

We have sought above to state with care what has been actually determined by the Supreme Court of the United States in the several cases referred to in the note, without attempting to anticipate future applications of that principle, or limitations upon it, in cases where the facts are different from those of the cases which have been thus far adjudged.<sup>2</sup>

<sup>1</sup> *Supra*, secs. 527–529.

<sup>2</sup> *Buchanan v. Litchfield*, 102 U. S. 278 (1880); *Dixon County v. Field*, 111 U. S. 83 (1883). *Buchanan v. Litchfield*, *supra*, involved the construction of a provision of the *Constitution of Illinois* of 1870 (art. 9, sec. 12), which ordains that “no county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any

manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness.” A statute of *Illinois* authorized cities to construct water-works, and for that purpose to borrow money and issue bonds. Bonds



§ 530. **Estoppel by recital of Matter of Fact, e. g. Date of Subscription.** — The effect of recitals in the bonds, and of statements in

were issued pursuant to the statute, each reciting that "it is issued under authority of an Act of the General Assembly of the State of Illinois [describing it], and in pursuance of an ordinance of said city of Litchfield, entitled 'An Ordinance to provide for the issuing of bonds and the construction of the Litchfield water-works.'" The constitutional provision above mentioned is not referred to in the statute authorizing the issue of the bonds, or in the ordinance, or in the bonds. At the time of the issue of the bonds the indebtedness of the city already exceeded the constitutional limit. Suit was brought for overdue coupons on these bonds by a *bona fide* holder for value, without any notice that the bonds were issued in excess of the constitutional restriction. The Supreme Court of the United States decided that the city was not liable, and that the plaintiff could not invoke the doctrine of estoppel; and reference was made to the absence of an express statement in the bonds themselves that the aggregate indebtedness, of which they were a part, was not in excess of the constitutional limit. In answer to the objection that the city was *estopped to make the defence*, the court says (*Ib.*, p. 292): "Any different conclusion from that indicated would extend the doctrines of this court upon the subject of municipal bonds further than would be consistent with reason and sound policy, and further than we are now willing to go. The present action cannot be maintained, unless we should hold that the *mere fact* that the bonds *were* issued, without any recitals of the circumstances bringing them within the limit fixed by the Constitution, was by itself conclusive proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued. We cannot so hold."

The court also said (p. 289): "The purchaser of the bonds was certainly bound to take notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of the taxable

property within the city for the year in which the bonds were issued." It is by no means clear from the opinion that a positive recital that the amount of the bond issue was within the constitutional limit would, if it was false, avail the holder. The language of the court as to the effect of such a recital, though strong, is hypothetical and *obiter*; and the effect of recitals under the constitutional provision is more fully considered in *Dixon County v. Field*, *infra*. Although the court distinguishes *Buchanan v. Litchfield* from previous cases where the over-issue of bonds was contrary to a *statute* limitation, yet after all it seems to indicate, to some extent, a recession from the high water-line of the cases from which it is thus distinguished.

In the subsequent case from *Ohio* of the Northern Bank of Toledo *v. Porter Township*, 110 U. S. 608 (1883), not involving, however, any constitutional limitation, the court, considering especially the scope and effect of a recital as an estoppel, decided that where the bond recites that it is issued in part payment of a subscription to the capital stock of a railroad, in pursuance of the several acts of the General Assembly and a vote of the qualified electors taken in pursuance thereof, while the corporation is thereby estopped by the recitals in the bonds from saying that no township election was held, or that it was not called or conducted in the particular mode required by law, it is not estopped to show that it was without legislative authority to order the election and to issue the bonds. "The question of legislative authority," said the court, "in a municipal corporation to issue bonds in aid of a railroad company, cannot be concluded by mere recitals; but, the *power* existing, the municipality may be estopped by the recitals to prove irregularity in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by the

the records of the county which issued the bonds, is considered in *The Town of Concord v. Portsmouth Savings Bank*.<sup>1</sup> A controlling

recitals which import such performance." (110 U. S. 619).

The principle of the decision in the case of *Buchanan v. Litchfield*, *supra*, was adopted and followed in the subsequent case of *Dixon County v. Field*, 111 U. S. 83 (1883), arising under the *Constitution of the State of Nebraska*, which ordains (art. xii., sec. 2) that "no city, county, town, precinct, municipality, or other subdivision of the State, shall ever make donations to any railroad or other work of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law; provided, that such donations of a county, with the donations of such subdivision, in the aggregate shall not exceed ten per cent of the assessed valuation of such county; provided further, that any city or county may, by a two-thirds vote, increase such indebtedness five per cent in addition to such ten per cent, and no bonds or other evidences of indebtedness so issued shall be valid, unless the same shall have endorsed thereon a certificate, signed by the secretary and auditor of State, showing that the same is issued pursuant to law." Suit was brought on negotiable bonds issued by Dixon County by a *bona fide* holder for value. The defence was that the bonds were issued in violation of the above-quoted provision of the Constitution. The plaintiff contended that the municipality was estopped from setting up this defence, by reason of the recitals in the bonds, and by the certificates of the secretary and auditor of State endorsed thereon. There were eighty-seven bonds issued at one time of \$1,000 each. Each bond contained a recital that it "*was issued under and in pursuance of an order of the county commissioners of the county of Dixon, and authorized at an election held in said county on the 27th of December, 1875, and under and by virtue of chapter 35 of the General Statutes of Nebraska and amendments thereto*

(being the act that authorized counties to issue bonds), and the Constitution of the State (art. 12), adopted October, A. D. 1875." On each bond was also endorsed the certificate of the county clerk, that the question of issuing said bonds was duly submitted to the people of the county, November 24, 1875, as follows: "Shall Dixon county issue to the C. C. & B. H. R. R. Company \$87,000 ten per cent twenty-year bonds? Which was decided in the affirmative by 462 votes against 120." There was also endorsed on the bond the certificate of the secretary and auditor of the State of Nebraska that it was issued pursuant to law. In point of fact, the assessed valuation of the county of Dixon for the year 1875 was \$587,331, and no more; that is to say, the amount of bonds issued was *more than ten per cent* of the assessed valuation of the county. On the principle that there must be authority of law by statute for every issue of bonds of a municipal corporation; that the corporation is bound by the recitals in such bonds only in respect of facts which the corporate officers had by law authority to determine and certify, but not in respect of facts which they had no authority to determine, — such as, whether the amount of the bonds in that case exceeded the constitutional limitation, — the Supreme Court decided that the county was not liable, saying: "There was no power at all conferred to issue bonds in excess of an amount equal to ten per cent upon the assessed valuation of the taxable property of the county. The amount of the bonds issued was known. It is stated in the recital itself. It was \$87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds as well as to the county officers. Nothing in the

<sup>1</sup> *Concord v. Portsmouth Savings Bank*, 92 U. S. 625 (1875).

question in the case was whether the power to subscribe for stock and issue bonds therefor, given by the act March 26, 1869, was

way of inquiry, ascertainment, or determination as to that fact is submitted to the county officers. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it." *Dixon County v. Field*, 111 U. S. 83 (1883). In the case next cited, *Potter v. Chaffee County*, the Circuit Court distinguished it from *Dixon County v. Field*.

The *Constitution of Colorado* contains a provision that no county shall contract any debt by loan, in any form, except for public buildings, public roads, and bridges, "and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following, to wit:" (here specifying the rates). The legislature of *Colorado* passed an act authorizing counties to fund their floating indebtedness. (Laws Colorado, 1881, p. 85.) In pursuance of that act, the county of Chaffee issued bonds, which contained a full recital showing compliance with all the provisions of the funding act. In the case of *Potter v. Chaffee County*, U. S. Circuit Court, Colorado, 1888 (33 Fed. Rep. 614), suit was brought against the county of Chaffee on such funding bonds. The county defended on the ground that the bonds were issued in exchange for county warrants, which warrants were void because issued in the first instance in violation of the constitutional limitation, above quoted, as to county indebtedness. The plaintiff was a *bona fide* holder of the funding bonds in suit. The Circuit Court, reviewing the cases of *Buchanan v. Litchfield*, *Dixon County v. Field*, *Bank of Toledo v. Porter Township*, held that they did not control the case before it, and gave judgment for the plaintiff. After referring to *Dixon County v. Field*, the Circuit Court, *Brewer, J.*, said: "But in the case now before this court, there is nothing upon the face of the bond which shows *how many bonds were to be issued or how large the series was*. The statute, in terms, gave to the county commissioners the power to determine the amount to be

issued; and no man could, by an examination of the bond, get any information as to the amount of the issue, or, by comparing any information given by the bond with the record notice of the assessed valuation, know that the county had exceeded its power in the issue of the bonds. So that, taking the case of *Dixon County v. Field* as the latest annunciation of the Supreme Court in respect to the rule of decision, it must be held that the county is estopped from pleading in this case that the bond was issued in exchange for a void warrant."

Since the foregoing was written and as this volume passes through the press, the Supreme Court of the United States has decided the cases of *Lake County v. Rollins* (130 U. S. 662) and *Lake County v. Graham* (1*b.* 674, 1888). In the case first cited the Supreme Court, reversing the same case below (34 Fed. Rep. 845), held that the constitutional provision in *Colorado* was an absolute limitation upon the power of the county to contract any and all indebtedness, including county warrants issued for ordinary county expenses. In the second case the same principle was applied to funding bonds of a county negotiable in form and in the hands of *bona fide* holders, issued under the authority of a funding act in excess of the constitutional limitation, although the bond recited that all of the provisions and requirements of the statute had been fully complied with by the proper officers in the issue of the bonds, and that such issue had been authorized by a vote of the majority of the duly qualified electors of the county. The bonds in suit showed that they were part of an issue amounting to \$500,000, and contained no reference to the Constitution, and no statement that the constitutional requirements had been observed. In this respect, if it be material, the bonds were different from those in suit in the case of *Potter v. Chaffee County*, *supra*, and this circumstance seems to be the only one to distinguish that case from *Lake County v. Graham*. In the latter case the court considered the principles of *Dixon County v. Field* applicable to the case, and

annulled by the new Constitution of the State (which took effect July 2, 1870) before the subscription was made, or a valid contract

distinguished it from cases where there had been an overissue of bonds contrary to the provisions of a statute, as in *Sherman County v. Simons*, 109 U. S. 735, and *Oregon v. Jennings*, 119 U. S. 74. *Lamar, J.*, speaking for the court, said: "The question here is distinguishable from that in the cases relied on by counsel for defendant in error [the overissue cases contrary to a statute]. In this case the standard of validity is created by the Constitution. In that standard two factors are to be considered: one the amount of assessed value, and the other the ratio between the assessed value and the debt proposed. These being the exactions of the Constitution itself, it is not within the power of the legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts."

The author may be permitted to observe that when the provisions of the statutes under which the overissue cases were decided are considered, they being silent as to the creation of any ministerial commission or special tribunal to decide upon the amount of indebtedness, it seems to be not easy to find logical and solid grounds for the distinction. But the distinction is made. It is doubtless a sound exposition of the Constitution; and as to the constitutional provision, it is firmly established by the judgments of the State tribunals, as well as by those of the Supreme Court of the United States. What effect it will hereafter have upon the soundness of the decisions sustaining bonds issued under similar circumstances, but in excess of a like statutory limitation, remains to be seen.

A holder of bonds issued in violation of such a constitutional provision is practically remediless. The *public policy* which underlies the constitutional limitation of *Illinois*, above mentioned, was upheld by the Supreme Court, in a case where the equities of the creditor strongly appealed for recognition and protection. We refer to the case of *Litchfield v. Ballou*, 114 U. S. 190. This was a sequel of *Buchanan v. Litchfield*, 102 U. S. 278. After the de-

cision in the last-mentioned case, holding the bonds to be void, suit was commenced against the city of Litchfield by Ballou, a large holder of the bonds, in which he alleged that the money received by the city for the sale to him of these bonds was used in the construction of a system of water-works for the city, of which the city is now the owner. That though the bonds were void, as held in the case of *Buchanan v. Litchfield*, yet that *in equity the city is liable to him for the money it received from him*; and since by the use of that money the water-works were constructed, he asked for a decree against the city for the amount, and if not paid, that the water-works of the city be sold to satisfy the decree. It appeared from the answer and proofs on the part of the city, that the lands on which the water-works were constructed were bought and paid for before the bonds were issued or voted, and much of the expense, also, of the construction of the water-works was paid by taxation, and by resources of the city other than the water-works bonds. A decree was passed as prayed, in the court below, which decree was reversed by the Supreme Court of the United States, with directions to dismiss the bill. The Supreme Court held that the *prohibitions of the Constitution extended as well to implied contracts to repay the money as to the express contracts found in the bonds*. Mr. Justice Miller's language on this point is very decisive. "The language of the Constitution," he says, "is that no city, &c., 'shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum of the value of its taxable property.' It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in *any manner*. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish. The prohibition is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law." The decree below was attempted

to subscribe was completed. The court held that, in point of fact a legal and binding subscription was made, or agreed to be made, in December, 1869, and hence the defence of want of legal power failed; and it then proceeded to view the case as affected by *estoppel*, the plaintiff being a *bona fide* holder for value without notice of any defence. The opinion was expressed that a recital in the bonds that the subscription was made in December, 1869, being the recital of a matter of fact, and a fact, too, peculiarly, if not exclusively, within the knowledge of the board of supervisors, estopped the county under the circumstances to set up that the subscription was not made until after July 2, 1870, when their authority to subscribe had expired.<sup>1</sup> As the same judgment could

to be sustained, on the theory that the city was in possession of the money received for the bonds, or, what is the same thing, its equivalent in property identified as having been procured with this money. The court held that this theory was not sustained by the proofs, or sustainable, inasmuch as the money received by the city from the bondholders had long since passed out of its possession, and could not be restored. Also held that it was not a case for the application of the principle that the plaintiff's money could be traced into property and a constructive trust fastened upon it, since other funds raised by taxation had also gone into the property, which had been purchased before the bonds were issued, or were public streets into which no property of the complainant had entered. This decision seems to leave the holders of the bonds remediless notwithstanding their strong equities, which equities there would appear to be no difficulty in ordinarily enforcing in equity as a lien, or on the principle of a constructive trust, if it were it not for the effect given to the constitutional prohibition.

Under Art. IX, sec. 8, *Pennsylvania Constitution* of 1874, a municipality may incur a debt or increase its existing debt to an amount exceeding two per cent upon the assessed valuation of the taxable property therein, if the whole indebtedness will not thereby exceed seven per centum of such valuation. This limit cannot be exceeded, unless the municipality procures the assent of the electors in the manner provided in the Constitution, and laws relating thereto. A bond, though in terms

negotiable, issued by a municipal corporation to fund a debt incurred contrary to the provisions of the Constitution, is void even in the hands of a holder for value. *Millers-town v. Frederick*, 114 Pa. St. 435 (1886); distinguishing *Kerr v. Corry*, 105 Pa. St. 232 (1884), where the power to issue the bonds existed, but the bonds themselves were misapplied, and a *bona fide* holder held entitled to recover. Purchasers of bonds are bound to take notice of the official statement required by the statute to be filed with the clerk of the proper county relating to the amount of municipal indebtedness and taxable values. If no such statement is filed its absence should put the proposed purchaser on inquiry, and this although the duty of making and filing such statement is imposed upon the officers of the municipality as a personal duty, and this although it will not operate against the municipality as an adjudication or an estoppel. *Ib.* Construction of constitutional provision limiting municipal indebtedness, see *Wheeler v. Philadelphia*, 77 Pa. St. 338, 351 (1875). As to the construction of limitations on municipal indebtedness, see *ante*, secs. 130-137; Index, tit. *Limitation on Indebtedness*; *East St. Louis v. People*, 124 Ill. 655; *Mr. Merryman's Article on Limitations on Municipal Indebtedness*, 29 *Central Law Journal*, 346 (November, 1889).

<sup>1</sup> *Concord v. Portsmouth Savings Bank*, 92 U. S. 625 (1875); *infra*, sec. 539. The point is so material that we subjoin the opinion delivered by *Strong, J.*, on this point. He says: "There is, however, another consideration that is worthy of

be reached on the ground that a valid contract to subscribe had been made *before* the Constitution took effect, it may be a question whether the last point was a point really adjudged by the court.

notice. The findings of the court are that the plaintiff below is a purchaser of the bonds for a valuable consideration, having purchased them before their maturity and without notice of any defence. They were executed by the president of the board of supervisors and the county clerk. They recite that they are issued by the county of Moultrie, 'in pursuance of the subscription of the sum of eighty thousand dollars to the capital stock of the Decatur, Sullivan, and Mattoon Railroad Company, made by the board of supervisors of said county of Moultrie, in December, A. D. 1869, in conformity to the provisions of an act of the General Assembly of the State of Illinois, approved March 26, A. D. 1869.' Now, if it be supposed that the purchaser of bonds with such recitals was bound to look further and inquire what was the authority for the issue, where was he to look? Had he looked to the act of the General Assembly of March 26, 1869, he would have found plenary authority for a stock subscription and for the issue of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2, 1870, he knew that any subscription made before that time continued binding notwithstanding the Constitution, and that bonds issued in payment of it were, therefore, lawful. If, then, he had inquired whether a subscription had been made before July 2, 1870, at the only place where inquiry should have been made, namely, at the records of the board, he would have found an order to subscribe, equivalent to a subscription made, in December, 1869, corresponding with the assertions of the recitals, and declared by them to have been a subscription. He could have made inquiry nowhere else with any prospect of learning the truth. Every step he could have taken assured him that the recitals were true. How, then, can the county be permitted to set up against a *bona fide* holder of the bonds that the authority to make a subscription, with all its legitimate consequences, had

expired before the subscription was made, in the face of the recitals and of the county records? Whether it had expired was a matter of fact, not of law, and it was peculiarly, if not exclusively, within the knowledge of the board of supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after July 2, 1870, when their authority expired." If the records of the county had contradicted the recitals in the bond, and had affirmatively shown that no subscription was made until *after* the Constitution took effect, would the purchaser of the bonds be bound to notice that fact? See *supra*, sec. 529 *a*, and note; *post*, secs. 539, 540, 549.

Purchaser not affected by statements in county records contrary to recitals in the bonds issued by the county. *Nicolay v. St. Clair County*, 3 Dillon C. C. R. 163 (1874). But compare sec. 529 *a*, and note. In *Aller v. Cameron, Ib.* 198, the defendant town was held estopped to set up against a holder of its bonds for value that it was *not legally incorporated*.

*Effect of recital* by authorized officers. See also *Chambers County v. Clews*, 21 Wall. 317, 321; *Grand Chute v. Winegar*, 15 Wall. 355; *Lynde v. County of Winnebago*, 16 Wall. 6; *C. B. & Q. R. R. Co. v. Otoe County*, 16 Wall. 667; *Mercer County v. Hackett*, 1 Wall. 83; *Woods v. Lawrence County*, 1 Black, 386; *Gelpcke v. Dubuque*, 1 Wall. 175; *Meyer v. Muscatine, Ib.* 384; *Kennicott v. Supervisors*, 16 Wall. 464. The Supreme Court of Illinois refused to follow the ruling in the last cited case. *Scates v. King*, 110 Ill. 456. A recital in a bond issued in payment of a subscription to railway stock, that it is authorized by a certain statute, will not estop the municipal corporation from asserting that the issue was not authorized by a proper vote as required by law. *Carroll County v. Smith*, 111 U. S. 556.

§ 531 (419). **Rationale of Estoppel.** — A correct view of this subject would seem to be this: Officers are the agents of the corporate body; and the ordinary rules and principles of the law of agency are applicable to their acts. Their unauthorized acts are not binding upon the corporate body of which they are the public agents. Ordinarily, their unauthorized representation that they have power to do an act is not binding upon the corporation; that is, the question is as to their power, *in fact and in law*, not what they have represented it to be. The only exception to this rule, in addition to the one hereinbefore treated of, to wit, where it is the sole province of the officers who issued the bonds to decide whether conditions precedent have been complied with, is where both parties have not equal means of knowledge as to the extent and scope of their powers, and where the particular character of their commission and authority is, from its nature and circumstances, peculiarly known to the officer or agent; in which case the principal will or may be bound by the false representations of the agent respecting his authority, and its extent and scope; but where the authority to act is solely conferred by statute, which, in effect is the letter of attorney of the officer, all persons must, at their peril, see that the act of the agent on which he relies is within the power under which the agent acts; and this doctrine is recognized by the Supreme Court of the United States in some of its judgments.<sup>1</sup> Accordingly, bonds *issued in violation of an express statute or constitutional provision* are void, though in the hands of innocent holders for value.<sup>2</sup> On the principle that there can be no *de facto* officer unless there is a *de jure* office, bonds executed

<sup>1</sup> The Floyd Acceptances, 7 Wall. 666 (1868); Marsh v. Fulton County, 10 Wall. 676 (1870). See, also, Clark v. Des Moines, 19 Iowa, 199, 210 (1865); Treadwell v. Commissioners, 11 Ohio St. 183, (1860), reviewing and criticising Knox County v. Aspinwall, 21 How. 539. See, also, Gould v. Sterling (action on bonds), 23 N. Y. 464; s. c. 1 Am. Law Reg. (N. S.) 290, and note of Prof. Dwight; Starin v. Genoa, 23 N. Y. 452; People v. Mead, 36 N. Y. 224; Dodge v. County of Platte, 82 N. Y. 218. United States v. City Bank of Columbus, 21 How. 356 (1858), is a very striking illustration of the general principle that a corporate officer cannot bind the corporation by his unauthorized acts or representations concerning the authority of himself or others. De Voss

v. Richmond, 18 Gratt. (Va.) 339 (1868); s. c. 7 Am. Law Reg. (N. S.) 589. Upon this principle it was held that the legislature may make the negotiability of municipal bonds dependent upon their delivery by a State officer, and that a purchaser of bonds purporting to have been issued under a statute containing such a condition, is not a *bona fide* purchaser without notice, in case the bonds are fraudulently issued without being delivered by the designated officer. McCrary, J., Lewis v. Barbour Co. Comm'rs, 3 Fed. Rep. 191.

<sup>2</sup> Aspinwall v. Daviess Co. Com., 22 How. 364; Marsh v. Fulton County, *supra*; Moore v. New York, 73 N. Y. 238, approving text. As to bonds issued in excess of constitutional and statutory limitations, see *supra*, secs. 527-530.

by persons purporting to be *de facto* officers of a county when there was no lawful statute in existence creating the office, are absolutely void for want of power to issue them.<sup>1</sup>

§ 532 (420). **Estoppel by Recitals in the Bond ; Illustration.** — So in a subsequent case, similar in character, *the common council of a city* were, by virtue of various statutes, authorized to subscribe for stock in a railroad company, and to issue bonds in payment therefor *on the petition of three-fourths of the legal voters of the city*. Before the issue of the bonds, the council decided that three-fourths of the citizens had petitioned, and the bonds themselves thus recited. The Supreme Court of the United States held that the council was the tribunal to decide whether the requisite number had petitioned; that it was contemplated that this question, which was one of fact, should be ascertained and conclusively settled prior to the issue of the bonds; and that when the city was sued upon the bonds by innocent holders for value, parol testimony was inadmissible to show that the petitioners did not constitute three-fourths of the legal voters of the city.<sup>2</sup>

<sup>1</sup> *Ante*, sec. 276; Norton v. Shelby County, 118 U. S. 425 (1885). In this case it appeared that the administration of local matters in each county in Tennessee had for nearly a century been vested in a County Court, or as often called, Quarterly Court, composed of justices of the peace elected in its different districts. Power was given to the County Court to make a subscription and issue bonds to a railroad company. Before the power was executed the legislature passed an act abolishing the County Court, and vesting its powers, including the power to subscribe for stock and issue bonds, in a Board of County Commissioners. The County Commissioners issued the bonds. The act abolishing the Quarterly Court and creating the Board of County Commissioners was held, after the issue of the bonds, to be unconstitutional by the Supreme Court of the State of Tennessee, on the ground that the County Court was one of the institutions of the State recognized in the Constitution, and that the act creating the Board of County Commissioners and conferring on them the powers of the County or Quarterly Court was unconstitutional and void; and hence it was held by the Supreme Court of the United States that the bonds had

no validity even in the hands of *bona fide* holders. The validity of the bonds was attempted to be sustained on the ground that the acts of the County Commissioners under a statute *subsequently* held to be unconstitutional, were to be regarded as the acts of officers *de facto*, and hence binding in favor of the *bona fide* holders of the bonds. But the Supreme Court decided otherwise; and, in a very learned and elaborate opinion, reviewing the authorities, by Mr. Justice Field, it is held: First, that it was the duty of the Federal Court on a question of this kind to follow the decision of the highest court of the State. Second, that there could, in law, be no such thing as an officer either *de jure* or *de facto* if there be *no office* to fill; and that the act attempting to create the office of commissioners never became a law and the office never came into existence. The view of the court on this point is tersely summed up in this sentence (*Ib.*, 442): "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

<sup>2</sup> Bissell v. Jeffersonville, 24 How. (U. S.) 287 (1860), approving Knox County



§ 533 (421). **Estoppel by Recitals in Bond; Illustration.**—In another case,<sup>1</sup> the action was upon coupons payable to bearer

v. Aspinwall, 21 How. 539; s. p. Evansville, I. & C. S. L. R. R. Co. v. Evansville, 15 Ind. 395 (1860); Moran v. Miami County, 2 Black, 722, 724 (1862); Marshall County Sup. v. Schenck, 5 Wall. 772 (1866); Rogers v. Burlington, 3 Wall. 654; Cincinnati v. Morgan, *Id.* 275; Mercer County v. Hacket, 1 Wall. 83; Meyer v. Muscatine, *Id.* 385, 393, *per Swayne, J.*; Gelpeke v. Dubuque, 1 Wall. 175, 203; Pendleton Co. v. Amy, 13 Wall. 297 (1871); St. Joseph Township v. Rogers, 16 Wall. 644 (1872). In the case last cited it was insisted that the bonds were invalid for want of the required vote. One of the answers of the court to this objection was that "the act of the legislature made it the duty of the supervisor who executed the bonds to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription, and inasmuch as he passed upon that question and subscribed for the stock, and subsequently executed and delivered the bonds, it was clearly too late to question their validity, where it appears, as in this case, that they are in the hands of an innocent holder." The decision in the case referred to in the text is clearly right, for the reason that the council were the body to decide the preliminary fact, and because,

also, according to the rule before stated, the fact was one not of a nature to be ascertained by purchasers in the market to whom the bonds were designed to be sold.

*Recitals in bonds.*—Where a bond recites that it is issued "under authority of" an act, reciting its title, such recital estops the municipality from making, as against a *bona fide* holder for value, the defence that the road *was not completed in time*. Oregon v. Jennings, 119 U. S. 74 (1886). To the effect that such a recital estops a town, as against a *bona fide* holder for value, from showing the conditions imposed on its liability by the vote of the people *had not been complied with*, although the statute declared that the bonds should not be valid and binding until compliance with such conditions, see Am. L. Ins. Co. v. Bruce, 105 U. S. 328. In Pana v. Bowler, 107 U. S. 529, 539, recitals in bonds in favor of a *bona fide* holder were held effectual to estop the municipality, as against an *alleged defect in the mode of conducting an election* held prior to the adoption of the Constitution of Illinois of 1870, the bonds being issued after its adoption, although that instrument forbade the issuing of the bonds, unless their issue should have been authorized under then existing laws by a vote of the

<sup>1</sup> Mercer County v. Hacket, 1 Wall. 83 (1863). This case, and the case of Woods v. Lawrence County, 1 Black, 386, are cited by Mr. Justice Hunt in the case of Grand Chute v. Winegar, 15 Wall. 372 (1872). The learned justice says: "The same principles were announced in Gelpeke v. The City of Dubuque, 1 Wall. 175, and in Meyer v. The City of Muscatine, *Id.* 384. In the latter case the court said that if the legal authority [that is, the legislative enabling Act] was sufficiently comprehensive, a *bona fide* holder for value has a right to presume that all precedent requirements have been complied with. By the act of February 10, 1854, the legislature of Wisconsin author-

ized the supervisors of the town of Grand Chute to make a plank-road subscription to the amount of ten thousand dollars. The bonds in question were signed by the chairman of the board of supervisors of that town, and recited that the subscription had been made by the supervisors of the town, and that these bonds were issued in pursuance thereof, for the purpose of carrying out the provisions of that act. The plaintiff was the *bona fide* holder for value of the bonds in suit, and his title accrued before their maturity. The cases cited are an answer to the numerous offers to show want of compliance with the forms of law, or to show fraud in their own agents."

belonging to negotiable bonds issued by a county in payment of stock subscribed for in a railroad company. By an act of assembly,

people prior to the adoption of the Constitution.

Recitals in a bond that it is issued in payment of a subscription authorized by a statute referred to, held not to estop the municipality to show that the issue was not authorized by a vote of two-thirds of the voters of the corporation, as required by the *Constitution* of the State. *Carroll County v. Smith*, 111 U. S. 556. Recitals in bonds that they were issued "in pursuance to the vote of the electors of Anderson County, September 13, 1869," held, in favor of a *bona fide* holder thereof, to be equivalent to a statement that the vote was one lawful and regular in form; and that evidence to show that the thirty days' notice of the election required by the statute was not given was not available to the municipality as a defence. The case was considered to fall within *Town of Coloma v. Eaves*, 92 U. S. 484, 491; *Anderson County Commissioners v. Beal*, 113 U. S. 227 (1884). Where the *Constitution* required the question of local taxation to be submitted to the electors, a statute which empowered the resident taxpayers to authorize a town to issue bonds in aid of a railroad, was declared unconstitutional and void. *Harrington v. Plainview*, 27 Minn. 224, followed in *Plainview v. Winona & St. Peter R. R. Co.*, 36 Minn. 505.

As to proceedings preliminary to issuing of bonds. *Ante*, secs. 163, 515, note; *Knox Co. Comm'rs v. Nichols*, 14 Ohio St. 260; *Atchison v. Butcher*, 3 Kan. 104 (1865); *Mercer County v. Hackett*, 1 Wall. 83; *Rogers v. Burlington*, 3 Wall. 654; *Moran v. Miami Co.*, 2 Black, 722; *Flagg v. Palmyra*, 33 Mo. 440; *Commonwealth v. Allegheny Co. Comm'rs*, 37 Pa. St. 237; compare *Marsh v. Fulton County*, 10 Wall. 676 (1870); *Treadwell v. Hancock Co. Comm'rs*, 11 Ohio St. 183 (1860); *post*, sec. 550; *Pendleton County v. Amy*, 13 Wall. 297; *City of Lexington v. Butler*, 14 Wall. 284; *St. Joseph Township v. Rogers*, 16 Wall. 644 (1872); *Grand Chute v. Winegar*, 5 Wall. 372 (1872); *New Haven, M. & W. R. R. Co. v. Chatham*, 42 Conn. 465.

Where authority to issue town bonds

could be exercised only upon the petition of a majority of taxpayers, "not including those taxed for dogs or highway tax only," a petition stating that the petitioners were "a majority of the taxpayers of the town" was held to be fatally defective. *Town of Mentz v. Cook*, 108 N. Y. 504 (1888). *Ante*, sec. 515, note.

A city was authorized to take stock in a railroad company "on the petition of two-thirds of the citizens, who are freeholders," &c. Bonds of the city were duly issued, signed by the proper officers and attested by the seal of the city, and on their face recited that they were issued by virtue of an ordinance of the city making the subscription. The minutes of the city council simply stated that "the freeholders of the city, with great unanimity, had petitioned," &c. It was held that the city council were the proper judges whether or not the required number had petitioned, and that the city, as against *bona fide* holders for value, was "concluded" by the ordinance "as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds." *Van Hostrup v. Madison City*, 1 Wall. (U. S.) 291 (1863); *s. p. Meyer v. Muscatine* (where charter required "a majority of two-thirds of the votes given") *Id.* 384, 393; *Aurora v. West*, 22 Ind. 88 (1864); *contra*, *People v. Mead*, 36 N. Y. 224. *Post*, sec. 550, note.

Where the act authorizing a municipality to issue bonds was not to take effect until "approved by two-thirds of the electors present at a city meeting held for that purpose, and a copy of its doings lodged in the office of the secretary of State," *bona fide* purchasers of such bonds are not bound to look beyond the certificate thus lodged, and are not affected by the action of the city, refusing at prior meetings to approve the act. *Society for Savings v. New London*, 29 Conn. 174 (1860).

*Fraud in the election* authorizing the subscription must be set up before rights have accrued. *Butler v. Dunham*, 27 Ill. 474; *People v. San F. Sup.*, 27 Cal. 655. Further as to the construction of powers

the county commissioners were authorized to subscribe the stock and *issue the bonds only upon the following* "restrictions, limitations, and conditions, and in no other manner or way whatever:" 1. "After, and not before, the amount of such subscription shall have been designated, advised, and recommended by a grand jury of the county." 2. Said "bonds shall, in no case, be sold by the railroad company at less than par." 3. That the acceptance of this act shall be deemed the acceptance of another act fixing the gauges of railroads in the county of Erie. The plaintiff was a *bona fide* holder for value, of a number of the bonds issued by the county. To defeat a recovery, the county on the trial offered to show, not that no recommendation by a grand jury was ever made, but that no such recommendation was made as the act required. The following was the recommendation: The grand jury "would recommend (omitting the words 'designate and advise') the commissioners of Mercer County to subscribe an amount not exceeding \$150,000," — but not otherwise designating the amount. The bonds referred on their face to the act of assembly and its date, which authorized their issue and recited that they were issued *in pursuance* thereof. This was regarded by the court not as an offer to show "that no law exists to authorize their issue, but as one to show that the recitals in the bonds are not true, and to show that they were not made 'in pursuance of the acts of assembly' authorizing them;" and, following *Knox County v. Aspinwall*,<sup>1</sup> it was adjudged that the matters thus offered to be shown constituted no defence against a *bona fide* holder, on the principle that "where bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further." And following *Woods v. Lawrence County*,<sup>2</sup> it was also ruled that it was no defence against such a holder that the bonds were sold by the railroad company for less than par, they being negotiable and the plain-

to aid in the building of railways, see *ante*, chap. vi. sec. 153 *et seq.* *Ante*, secs. 515, 519, and notes.

<sup>1</sup> *Knox Co. Comm'rs v. Aspinwall*, 21 How. 539.

<sup>2</sup> *Woods v. Lawrence County*, 1 Black, 386. In *Woods v. Lawrence County*, above cited, it was also held where the statute requires the grand jury to fix the amount of a subscription to railroad stock, and to approve of it, and upon their report being filed empowers commissioners to carry the same into effect by making its subscription in the name of the county, that if these things be done agreeably to

the law, the county cannot afterwards deny its obligation to pay the amount subscribed. In a suit brought to recover the arrears of interest on such bonds, it is not necessary for the holder to show that the grand jury fixed the manner and terms of paying for the stock; nor is it a defence for the county to show that the grand jury omitted to do so. It is enough that the manner and terms of payment were agreed upon between the company and the commissioners. This case, among others, was cited and approved in *Grand Chute v. Winegar*, 15 Wall. 372 (1872); s. c. 5 Chicago Legal News, 337.

tiff innocent. And it was also decided that the acceptance by the railroad company of the bonds authorized by the act operated *per se* as an acceptance of the gauge law.

§ 534 (422). **Estoppel by Recitals in the Bond ; Illustration.** — In another case, authority to a city “to take stock in any chartered company for making a road, or roads, *to the said city*,” was held, in favor of a *bona fide* purchaser of its bonds, to *authorize* it to subscribe to a railroad which, by the terms of its charter, and in fact *did not terminate at said city*, but whose nearest terminus was forty-six miles distant, it appearing that there was, at the time of said subscription, another railroad leading from that terminus to the city.<sup>1</sup> Authority was given by the legislature to the city of Milwaukee to issue bonds in aid of a railroad company specially named, “and any other railroad company duly incorporated and organized for the purpose of constructing railroads leading from the city of Milwaukee,” &c., and it was held, such having been the construction put upon it by the city authorities at the time, that the power to issue bonds *was not confined to companies then in existence*, but extended to companies afterwards created.<sup>2</sup>

§ 535 (422 a). **Estoppel by Recital in Bond ; Illustration.** — In another case,<sup>3</sup> the *city was held liable upon bonds* issued to a railway company under the following circumstances, viz.: The legislature authorized the city to subscribe on the condition of a majority vote; the city embodied three conditions in the proposition submitted to the voters, one of which was that \$1,000,000 should be subscribed by other parties; the vote carried; other parties did not subscribe the \$1,000,000; the city refused to subscribe and issue bonds, but

<sup>1</sup> Van Hostrup v. Madison City, 1 Wall. 291 (1863); see *Aurora v. West*, 9 Ind. 74; s. c. 22 Ind. 88, 96, 503. The decision in *Van Hostrup v. Madison City* was undoubtedly influenced by the natural desire to protect the holders of the bonds. Doubts can but be entertained that the Columbus and Shelby Road, distant and between different points, was a road leading to Madison. Note remarks of *Nelson, J.* See also *Kirkbride v. Lafayette Co.*, 108 U. S. 208.

<sup>2</sup> *James v. Milwaukee*, 16 Wall. 159 (1872).

In *Lynde v. Winnebago County*, 16 Wall. 6 (1872), a special submission, under the laws of *Iowa*, to a popular vote, was

construed to give the requisite authority to issue the bonds of the county to raise money to build a *court-house*. The case also holds that it was competent for the proper county official (the county judge) to visit *New York* for purposes connected with the disposition of the bonds, and while there, *and out of his jurisdiction*, to *issue and seal new bonds with a new seal procured at the time*, in exchange for bonds already issued, but not yet put on the market, and it was so held although the statute of the State provided that in the case of the *absence* of that officer the county clerk should take his place.

<sup>3</sup> *Lexington v. Butler*, 14 Wall. 282 (1871).

was compelled to do so by a *mandamus* of an inferior court, whose judgment was afterwards reversed by the Court of Appeals of the State, which held that the city had no authority to take the stock or issue the bonds until the \$1,000,000 had been subscribed by other parties. Meanwhile, however, bonds were issued by the city, bearing its seal and signed by its mayor and clerk, reciting that they were duly issued under a specified act of the General Assembly.

§ 536. **Same subject.** — The Supreme Court of the United States held in the case last cited that a *bona fide* holder for value of these bonds, who had no actual notice of the facts relied on for a defence, could recover thereon. Mr. Justice Clifford, delivering the opinion of the court, makes use of this language in stating the ground of the judgment: "Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock and issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this court have established the rule that when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached in the hands or such a holder than any other commercial paper." By the expression that it is admitted that the city "possessed the power to subscribe for the stock and to issue the bonds," reference is undoubtedly made to the act of the legislature which gave this power on condition of a majority vote, and possibly to the fact that it was admitted in the plea that the vote was cast in favor of the subscription, for otherwise it seems to have been denied that the power existed; and that it did not exist as between the city and the railroad corporation was decided by the Court of Appeals of the State. The substance of the decision of the United States Supreme Court in this case would seem to be that a *bona fide* purchaser of the bonds had a right to presume that the condition annexed by the city as to the \$1,000,000 of other subscriptions had been complied with; and thus viewed, the judgment of the court rests upon grounds whose soundness cannot admit of question. It is not an authority upon its essential facts in favor of the proposition that if the bonds had been issued without any vote, or attempt at a vote, they would have been binding, in the absence of estoppel other than by recitals, or in the absence of other ground of liability.

§ 537 (422 b). **Other Grounds of Estoppel.** — In another case,<sup>1</sup> the authority to subscribe for the stock of the company was given *on con-*

<sup>1</sup> Pendleton v. Amy, 13 Wall. 297 (1871).

*dition that the county should so vote by a majority of real estate holders residing therein.* A subscription was made in 1853, and a certificate of stock was issued to the county, which was received by it, and was still owned by it in 1869, when suit was brought. It did not appear that the bonds contained any recitals that conditions precedent had been complied with, or that the county had subsequently levied taxes to pay interest on the bonds. The county set up as a defence that there was no power to issue the bonds, because no vote of the people had ever been taken. The plaintiff being a *bona fide* holder, it was held that he was entitled to recover, and that the county was *estopped* to set up that no vote was had. The ground of the estoppel is thus stated by Mr. Justice Strong: "The county received in exchange for the bonds a certificate of the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, we think the county cannot retain the proceeds of the exchange, and assert against a purchaser of the bonds for value that though the legislature empowered it to make them, and put them upon the market, upon certain conditions, they were issued in disregard of the conditions." It will be observed that if the court had been of opinion that the bonds were enforceable in the hands of a holder for value though *no* election had in fact ever been held, the case would naturally have been put upon that ground.

§ 538. **What constitutes Completed Subscription or Contract to subscribe.**—Interesting questions have arisen as to *what constitutes a subscription* on the part of a municipality or other public corporation, or a valid contract to subscribe, to the stock of a railroad company, and when rights are vested thereunder which cannot be legislatively impaired without the consent of the parties in interest. Where a precedent popular vote is required, and upon such vote authority is given to subscribe for the stock, the vote without more does not constitute a contract between the municipality thus authorized to subscribe and the railroad company.<sup>1</sup>

<sup>1</sup> *Aspinwall v. County of Jo Daviess*, 22 How. 364; *Town of Concord v. Portsmouth Savings Bank*, 92 U. S. 625; *Harshman v. Bates County*, 3 Dillon C. C. R. 150, 162, note; s. c. affirmed in Supreme Court, 92 U. S. 569 (1875); *ante*, sec. 70, and cases cited. *German Bank v. Franklin County*, 128 U. S. 526 (1888). Subscription by a county for stock held to be complete, although no actual subscription was made on the stock books of the com-

pany. *Bates County v. Winters*, 112 U. S. 325 (1884). For what is necessary to complete a valid subscription, see *Nugent v. Putnam Co. Sup.*, 19 Wall. 241; *Moultrie County v. Rockingham T. C. Sav. Bank*, 92 U. S. 631; *infra*, secs. 539, 540.

The rights of a municipality as a stockholder in a railroad company, and whose stock has been paid for by the bonds of the municipality, are no greater than the rights of other stockholders; and unless

§ 539. **Same subject. Power may be annulled by Constitutional Provision or Legislative Action before Rights become vested; Bonds in Such Case are void in Everybody's Hands.** — As illustrating the necessity of a continued existence of the power to issue the bonds, and as showing what did *not* amount to a completed contract before the power was repealed by a constitutional provision, the case of the Town of Concord v. Portsmouth Savings Bank may usefully be referred to.<sup>1</sup> Chronologically stated, the facts were these: The bonds were issued under the act of March 7, 1867, and so recited. The act enacted that certain incorporated towns and cities, and towns acting under the township organization law (among which it was conceded the town of Concord was one), should be and were severally authorized to *appropriate* such sum of money as they might deem proper to the Chicago, Danville, and Vincennes Railroad Company, to aid in the construction of the road of said company, to be paid to the company as soon as the track of said road should have been located and constructed through said city, town, or township respectively. To this was attached the following proviso: "Provided, however, that the proposition to *appropriate* moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns, or cities, at a regular annual or special meeting, by giving at least ten days' notice thereof; and a vote shall be taken thereon by ballot at the usual place of election, and if the majority of votes cast shall be in favor of the *appropria-*

*pecially* authorized by the legislature, the railroad company has no power, when receiving the subscription and bonds, to agree to put the municipality in a better position than other stockholders, as, for example, by agreeing to pay a fixed rate of interest on such stock, equivalent in amount to the interest on the municipal bonds issued in payment therefor. Pittsburgh & S. Railroad Co. v. Allegheny County, 79 Pa. St. 210 (1875); s. c. 3 Cent. Law Jour. 204. Instance in which there was legislative authority for such a contract, see case of the Pittsburgh and Connelville Railroad Co., 63 Pa. St. 126. When contract to subscribe stock is completed. Shelby County Court v. Cumberland & O. Railroad Co., 8 Bush (Ky.), 209, 300; Chicago, K. & W. R. R. Co. v. Osage County, 38 Kan. 597. Where a township delivered its bonds in escrow to a State officer, to be held until the completion of the road in aid of which they were issued, and the officer returned them to the town-

ship upon an adjudication by the Supreme Court of the State that the law authorizing the issue was unconstitutional, it was held, in a suit brought by the railroad thirteen years afterwards, and after the decision of the State court had been reversed by the Supreme Court of the United States, that the return of the bonds by the State officer and their retention by the township were a conversion which entitled the railroad company to bring suit at once, but that the bill brought after such a lapse of time should be dismissed. Young v. Clarendon Tp., 26 Fed. Rep. 805.

<sup>1</sup> Concord v. Portsmouth Savings Bank, 92 U. S. 625 (1875); see *infra*, sec. 540, note. Effect of the constitutional provision of Illinois of July 2, 1870, quoted in the text, see German Bank v. Franklin County, 128 U. S. 526 (1888), and cases there cited, in Illinois and in the Supreme Court of the United States, construing and applying the same. *Post*, secs. 542, 550; *ante*, sec. 530.

tion, then the same shall be made, otherwise not." The second section empowered and required the authorities of said municipalities to levy and collect a tax, and make such provisions as might be necessary for the prompt payment of the *appropriation* under the provisions of the law. The town voted on the 20th day of November, 1869, that it would make a donation, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation. On the 2d of July, 1870, the new Constitution of the State went into operation, by which it was ordained that "no city, town, township, or other municipality shall ever become *subscribers* to the capital stock of any railroad or private corporation, or make *donation* to, or loan its credit in aid of, such corporation; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such *subscriptions*, where the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption." On the 9th day of October, 1871, the bonds in suit were executed and delivered as a donation to the railroad company; and the question was whether there was any existing authority to make the donation and issue the bonds. The Supreme Court, after pointing out that the authority given to the town of Concord by the act of March 7, 1867, was not to subscribe for stock, but to make an appropriation or donation, which distinction is also taken in the provision of the Constitution above quoted, held that no donation could be made, under the act of 1867, until after the completion of the location and construction of the road through the town; that the vote of November 20, 1869, in favor of an appropriation, was not an appropriation or donation; that the power to make such donation was annulled by the Constitution on July 2, 1870, and that there was at that date no contract *in esse* between the town and the railroad company which stood in the way of the operation of the constitutional prohibition. As to the effect of the vote of the town, of November 20, 1869, and the acceptance of the railroad company of June 20, 1870 (both of which, it will be observed, were before the Constitution went into operation), the court observed: "But the town was not empowered to make the donation until the road was located and constructed through the town. It had no authority to make a contract to give; and the acceptance was an undertaking to do nothing which the company was not bound to do before the authority of the town to make a donation, or to engage to make a donation, came into existence. What is called the acceptance of the railroad company cannot be construed as an engagement to



locate and build the railroad through the town. It amounted to no more than saying, 'If we build our road through your town, we will receive your gift.' There was, therefore, no consideration for the town's promise to give, even if the popular vote can be considered a promise. There was no contract to be impaired. A contract should be clearly proved before it invokes the protection of the Federal Constitution. We conclude, then, that at the time the donation was made, there was no authority in the municipality to make a donation to the railroad company, and consequently no authority to issue the bonds. It follows that the bonds and coupons are void."<sup>1</sup>

§ 540. **Same subject. Mode of Subscription ; when Subscription Complete.** — Power by legislative act *to the board of supervisors of a county to subscribe* an amount not exceeding a given sum to the stock of a specified railroad company, and to issue bonds in payment therefor, without requiring the sanction of a popular vote, but *with a proviso that the bonds shall not be issued until the road is open for traffic*, gives complete authority to the county to subscribe for the stock, or to make a binding agreement to subscribe therefor preparatory to a final subscription. The proviso that the payment of the subscription should be postponed until the railroad should be opened does not limit the power to subscribe, or to enter into an agreement to make the subscription before the road is completed. And it was held that *a resolution of the board of supervisors, made when the power to subscribe existed or had arisen, that the county subscribe a given sum to aid in the construction of the road of the company, without any subscription on the books of the company, amounted to a subscription, or, at all events, to a legal undertaking to subscribe, which, when assented to or accepted by the company, became a binding contract, which the county could not revoke, and which could not be impaired by any subsequent prohibition of the Constitution or the legislature without the assent of the railroad company.*<sup>2</sup>

<sup>1</sup> In *Iowa* it is held that if money be expended before the repeal of a statute, upon the faith of the tax provided for by it, the repeal does not invalidate the tax and it may be collected. *Burges v. Mabin*, 70 Iowa, 633 ; *approved Barthel v. Meader*, 72 Iowa, 125.

<sup>2</sup> *Town of Concord v. Portsmouth Savings Bank*, 92 U. S. 625 (1875) ; *Livingston County v. Portsmouth Bank*, 128 U. S. 102, 126 (1888) ; *Scott v. Hansheer*, 94

Ind. 1 ; *infra*, sec. 540, note. A municipal corporation which issued its bonds to a railroad company *formed by consolidating* two other companies was held estopped to deny the validity of the consolidation. *Young v. Township of Clarendon*, 26 Fed. Rep. 805. See *infra*, sec. 541. In a case where a subscription was made to a railroad company by a city, payment to be made when ten miles of the railroad was completed, and the charter of the company

But before any subscription is made, or before any contract to subscribe is completed, the authority to subscribe may be repealed or taken away by legislative or constitutional provision.<sup>1</sup> And if the authority to subscribe depends upon a precedent vote of the people, the vote, without a subscription or an agreement to subscribe, does not create a contract, or preclude the repeal of the authority to make the subscription:<sup>2</sup> it is executory until the sub-

required it to complete its line in fifteen years, it was held that an extension of the time within which the line could be completed did not release the subscription. *Jacks v. City of Helena*, 41 Ark. 213.

<sup>1</sup> For the effect upon incomplete subscriptions of the adoption of constitutional provisions forbidding or limiting the power to aid railroads, see *infra*, sec. 542, note; and, also, *Concord v. Robinson*, 121 U. S. 165, distinguished, *German Bank v. Franklin County*, 128 U. S. 526, 543 (1888); *Katzenberger v. Aberdeen*, 121 U. S. 172; *Oregon v. Jennings*, 119 U. S. 74, distinguished, *German Bank v. Franklin County*, 128 U. S. 526, 543 (1888); *Norton v. Shelby County*, 118 U. S. 425. The effect of the prohibition in the Constitution of *Missouri* of 1865, of municipal subscriptions in aid of railways without the previous assent of two-thirds of the qualified voters, has been considered in many cases determined in the State courts of *Missouri* and in the Federal courts. The State courts first held that the effect of the constitutional provision was to limit the future exercise of legislative power, but did not take away any authority granted and in existence at the time the Constitution of 1865 went into operation. Subscriptions were made and railway bonds issued when this construction prevailed; and the Federal courts held that such bonds were valid. The Supreme Court of *Missouri* afterwards put a different construction on the Constitution; but the Supreme Court of the United States declined to reconsider its former decisions, to the prejudice of *bona fide* holders of bonds issued prior to the change of decision in the State court. The cases on this subject are reviewed by Mr. Justice *Harlan*, in *Scotland County v. Hill*, 132 U. S. 107 (1889).

Illustrative of the distinction between

the operation of a constitutional limitation upon the power of the legislature and of a constitutional inhibition upon a municipality, is the case of *Norton v. Brownsville*, 129 U. S. 479 (1888). Here an act of February 8, 1870, authorized Brownsville to issue bonds in aid of a railroad company on a majority vote. May 5, 1870, the amended Constitution took effect, which ordained that "the credit of no city shall be given or loaned to or in aid of any person or corporation, except upon an election to be first held by the qualified voters, and the assent of three-fourths of the votes at said election." May 11, 1870, five days after the amended Constitution took effect, proceedings were initiated to issue bonds, and an election was held under the act of February 8, 1870, at which every vote was cast for the issue of bonds. The bonds recited that they were issued by authority of the act of February 8, 1870. It was held that the power to issue bonds under the act of 1870 not having been acted upon until after the Constitution of 1870 went into effect, such power could not be exercised without further legislation in conformity therewith; the effect of the constitutional prohibition being to annul all unexecuted powers conferred upon the corporation. Whether this would have been the effect if the terms of the act of 1870 and of the constitutional amendment had not been inconsistent, *quære*. See *Jarrott v. Moberly*, 103 U. S. 580; *Kelley v. Milan*, 127 U. S. 139, 154; *post*, sec. 851 a; *Norton v. Taxing District of Brownsville*, 36 Fed. Rep. 99 (U. S. Cir. Ct., W. D. Tenn. 1888).

<sup>2</sup> *Aspinwall v. County of Jo Daviess*, 22 How. 364 (1859); U. P. R. R. Co. v. Davis Co., 6 Kan. 256 (1870); *State v. Saline Co.*, 45 Mo. 242; *Jeffries v. Lawrence*, 42 Iowa, 498 (1876); *Bound v. Wis. C. R. Co.*, 45 Wis. 543; *ante*, sec. 70;

scription is actually made.<sup>1</sup> But an actual manual subscription on

post, sec. 866, note, and cases there cited; *Harshman v. Bates County*, 3 Dillon C. C. R. 162, note; affirmed 92 U. S. 579; *German Bank v. Franklin County*, 128 U. S. 526 (1888). The law on this subject is thus stated and the cases referred to and distinguished, by Mr. Justice *Strong*, in *The Town of Concord v. Portsmouth Savings Bank*, *supra*:—

“This case [although between the same parties] differs very materially from the case of *The Town of Concord v. The Portsmouth Savings Bank*, No. 43, of this term. [*Supra*, sec. 539.] In that, we held that the bonds were void because the legislative authority to issue them as a donation to the railroad company had been annulled by the Constitution of the State before the donation was made. . . . But a subscription on the books of the company was unnecessary, for that which amounted to a subscription had been made in December, 1869. The authorized body of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract, or they may bind it by a resolution, or by vote clothe its officers with power to act for it. The former was the clear intention in this case. The board clothed no officer with power to act for it. The resolution to subscribe was its own act, its immediate subscription. *Western Saving Fund Society v. The City of Philadelphia*, 31 Pa. St. 175; *Sacramento v. Kirk*, 7 Cal. 419; *Logansport v. Blake-more*, 17 Ind. 318. In *Clarke County Court v. Paris, W. & Ky. R. Turnp. Co.*, 11 Ben. Monroe (Ky.), 143, it was ruled that an order of the county court, by which it was said the court subscribed, on behalf of Clarke County, for fifty shares of stock in the turnpike company, if concurred in by a competent majority of the magistrates, was itself a subscription, and bound the county. There was no subscription on the books of the company; but the Court of Appeals said, “We cannot, therefore, regard this order as a mere offer or

pledge to subscribe the fifty shares in this particular road, but as actually taking, and in substance and legal effect subscribing for that number of shares. So in *Nugent v. The Supervisors of Putnam County*, 19 Wall. 241, it was said *that to constitute a subscription by a county to stock in a railroad company, it is not necessary that there be an act of manual subscribing on the books of the company*. These cases lead directly to the conclusion that the action of the board of supervisors in December, 1869, was in substance and in legal effect a subscription. And if this conclusion could not be reached, it would make but little difference to the present case, for it could not be doubted that the action of the board was at least an undertaking to subscribe, and this was assented to or accepted by the railroad company. The resolutions were entered of record by the clerk and president of the railroad company, and the company made an appropriation of the bonds to be received in payment of the subscription, by a contract made on the 15th of April, 1870. In either aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new Constitution came into operation. No matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the Constitution. The delivery of the bonds was no more than performance of the contract. For these reasons, it is in vain to appeal to the decisions made in *Aspinwall v. The County of Jo Daviess*, 22 How. 364, and *The Town of Concord v. The Savings Bank*, decided this term. In neither of those cases was there any contract made before the authority to make one was annulled. We do not assert that the constitutional provision did not abrogate the authority of the board of supervisors to make a subscription for railroad stock. On the contrary, we think it did. But we hold that contracts made under the power while it was in existence

<sup>1</sup> *Id.*; *Cumberland & O. R. R. Co. v. Barren Co. Court*, 10 Bush (Ky.), 604

(1874); *Shelby Co. Court v. Cumberland & O. R. R. Co.*, 8 Bush (Ky.), 209.

the books of the company is not necessary to entitle the county to the stock, or to bind it as a subscriber thereto.<sup>1</sup>

§ 541. **Same subject. Completed Subscription; Effect of Consolidation of Railway Companies on validity of Subscription.**—The authority to make a subscription and to issue bonds in payment therefor *may, if it has never been executed, be revoked by any event* which has the legal effect to ~~extinguish~~ the power. Thus, where the power to subscribe depends upon a precedent popular vote and the vote is had in favor of Company A, which under a general law of the State consolidated with Company B, and formed thereby a new company, C, which consolidation was effected *before* any subscription or contract for subscription was made, and the only subscription made was to the consolidated company, without any new election, it was held that the subscription was unauthorized, and that the bonds which recited these facts were void, even in the hands of a *bona fide* holder for value. The ground of the decision was that the authority to make the subscription ceased with the extinction of the company in whose favor the vote was had, such extinction being the legal consequence of the consolidation.<sup>2</sup> This

were valid contracts, and that the obligations assumed by them continued after the power to enter into such contracts was withdrawn. The operation of the Constitution was only prospective. Indeed, it is expressly ordained in its schedule that 'all rights, actions, prosecutions, claims, and contracts of the State, individuals, or bodies corporate, shall continue to be as valid as if this Constitution had not been adopted.' It is hardly necessary to say that, under the act of the general assembly, the authority to make a subscription was coupled with an authority and a duty to issue county bonds for the sum subscribed. No action of the board was needed after the subscription was made."

<sup>1</sup> Cass County v. Gillett, 100 U. S. 585.

<sup>2</sup> Harshman v. Bates County, 92 U. S. 569 (1875). The grounds of the judgment of the court on this point are thus succinctly stated by Bradley, J.:—

"Another objection to the validity of the subscription for which the bonds were given in this case is, that the township voted a subscription to one company and the county court subscribed to another.

This is sought to be justified on the ground that the former company became consolidated with another, thereby forming a third, to whose stock the subscription was made. This consolidation was effected under a law of *Missouri* authorizing consolidations, and declaring that the company formed from two companies should be entitled to all the powers, rights, privileges, and immunities which belong to either; and it is contended that this provision of the law justified the county court in making the subscription without further authority from the people of the township. But did not the authority cease by the extinction of the company voted for? No subscription had been made. No vested right had accrued to the company. The case of *The State v. Linn County Court*, 44 Mo. 504, only decides that if the county court refuses to issue bonds after making a subscription, a *mandamus* will lie to compel it to issue them. There the authority had been executed and a right had become vested. But so long as it remains unexecuted, the occurrence of any event which creates a revocation in law will extinguish the power. The extinc-

case differs from *Nugent v. The Supervisors of Putnam County*<sup>1</sup> in the material circumstance that in that case the subscription to one of the constituent companies was *before* the consolidation, while in this one it was *afterwards*. In this case there was nothing but a bare vote before the consolidation, which, without more, creates no contract between the municipality and the railroad company; while in the Putnam County case there was a subscription in addition to the vote, before the consolidation; and the right, having become vested in the railroad company, may be transferred to another on an authorized consolidation being effected. Where the consolidation is provided for or contemplated by the legislation of the State in force when the subscription is made, a subsequent consolidation, in pursuance of the enactment, does not have the effect to invalidate the subscription. This principle was distinctly settled in the Putnam

tion of the company in whose favor the subscription was authorized worked such a revocation. The law authorizing the consolidation of railroad companies does not change the law of attorney and constituent. It may transfer the vested rights of one railroad company to another, upon a consolidation being effected; but it does not continue in existence powers to subscribe for stock given by one person to another, which, by the general law, are extinguished by such a change. It does not profess to do so, and we think it does not do so by implication. As sufficient notice of these objections is contained in the recitals of the bonds themselves to put the holder on inquiry, we think that there was no error in the judgment of the circuit court; and it is, therefore, affirmed."

Same case in circuit court, 3 Dillon C. C. R. 150; s. r. McClure v. Oxford, 94 U. S. 429; Bates County v. Winters, 97 U. S. 83 (1877); s. c. again, 112 U. S. 325 (1884), and see *Livingston County v. Portsmouth Bank*, 128 U. S. 102 (1888), where the same statutes are considered, and the court refused to apply the doctrine of *Harshman v. Bates County*, 92 U. S. 569, and *Bates County v. Winters*, 97 U. S. 83. See *supra*, sec. 540, note; *State v. Garroute*, 67 Mo. 445, where the court say the consolidation does not operate to transfer to the latter the franchises and unexecuted rights of former companies so as to authorize a subscription to be

made to the Hannibal & St. Joseph Railroad Co. without a popular vote; and such subscription is void. The consolidation operated an extinction of the original company, and the power to subscribe thereto perished with the company. In such case there could be no innocent purchasers of the bonds. *Id.* See reference to this case in *Livingston County v. Portsmouth Bank*, 128 U. S. p. 128 (1888). See also *Menasha v. Hazard*, 102 U. S. 81. In *Iowa* it is held that the alienation of a railroad before its completion works a forfeiture of a tax voted in its aid, the decision being based upon the provisions of a statute requiring that the taxpayers shall receive stock in the corporation to the amount of taxes paid by them. Held also, that the collection of taxes in such cases may be enjoined at the suit of a taxpayer. *Manning v. Matthews*, 66 Iowa, 675; *Blunt v. Carpenter*, 68 Iowa, 265.

<sup>1</sup> *Nugent v. The Supervisors of Putnam County*, 19 Wall. 241. See *Ray Co. v. Vansycle*, 96 U. S. 675, where a subscription by the county authorities to another company was sustained and the doctrine of estoppel applied. See also, *Cass Co. v. Gillett*, 100 U. S. 585; *Harter v. Kernochan*, 103 U. S. 562. One subscription does not exhaust the power. *People v. Waynesville*, 88 Ill. 469. Irregularities no defence. *Roberts v. Bolles*, 101 U. S. 119; *Empire Tp. v. Darlington*, 101 U. S. 87.

County case just cited;<sup>1</sup> and such existing legislative authority to change the organization controlled the decision, and constituted, in the judgment of the court, the ground of distinction between that case and the oft cited case of *Marsh v. Fulton County*.<sup>2</sup> Indeed, the Supreme Court has since gone farther, and has frequently decided, where at the date of the vote in favor of the constituent company there exists a statute authorizing its consolidation with another company, that such consolidation does not necessarily extinguish the power to subscribe given by the vote, and that bonds issued to the consolidated company under such vote are, or might be valid.<sup>3</sup>

§ 542. **There must be a Valid Legislative Act as the Basis of the Power; Construction of Special Powers.**—A purchaser of municipal bonds is bound, as has already been incidentally shown, to take notice of any provisions of the Constitution or legislation of the State relating to the power of the municipality to issue them; and if the act conferring the power is in conflict with the Constitution, the bonds are void, even in the hands of a *bona fide* holder for value.<sup>4</sup> And the purchaser must also notice the pro-

<sup>1</sup> 19 Wall. 241. The principle was followed and applied in *Thomas v. Scotland County*, 3 Dillon C. C. R. 7; s. c. 94 U. S. 682, and in *Washburn v. Cass County*, 3 Dillon C. C. R. 251, and the bonds held valid notwithstanding the consolidation. A change in the name of the company will not invalidate the subscription. *Reading v. Wedder*, 66 Ill. 80.

<sup>2</sup> *Marsh v. Fulton County*, 10 Wall. 676. In *People v. Granville*, 104 Ill. 285, an act providing that the liability of municipal corporations which had voted aid to railroads should cease on a certain date, after which no bonds should be issued in virtue of any previous vote, was held to be a statute of limitation, not impairing the obligation of contracts; and a *mandamus* to compel the issue of bonds after that date was refused.

<sup>3</sup> *County of Scotland v. Thomas*, 94 U. S. 682 (1876), distinguishing *Harshman v. Bates County*, 92 U. S. 569; s. p. *Scotland County v. Hill*, 132 U. S. 107 (1889); *East Lincoln v. Davenport*, 94 U. S. 801 (1876); *Wilson v. Salamanca*, 99 U. S. 499 (1878); *Menasha v. Hazard*, 102 U. S. 81 (1880); *Harter v. Kernochan*, 103 U. S. 562 (1880); *New Buffalo v. Iron Co.*

105 U. S. 73 (1881). The cases on this subject are carefully stated and considered by *Blatchford, J.*, in *Livingston County v. Portsmouth Bank*, 128 U. S. 102 (1888), distinguishing and limiting, if not, indeed, overruling *Harshman v. Bates County. Ante*, sec. 540.

<sup>4</sup> *Harshman v. Bates County*, 92 U. S. 569 (1875), distinguished, *Bates County v. Winters*, 112 U. S. 325; *Lamoille Val. R. Co. v. Fairfield*, 51 Vt. 257; *Allen v. Louisiana*, 103 U. S. 80; *Jarrolt v. Moberly*, 103 U. S. 580; *Wells v. Pontotoc Co. Sup.*, 102 U. S. 625; *Ogden v. Daviess Co.*, 102 U. S. 634; *supra*, sec. 529 a; *post*, sec. 553. As the decision in the first case is supposed to invalidate all the bonds issued under the Township Aid Act of *Missouri*, of March 23, 1868, said to amount to nearly \$3,000,000, the point on which the act was decided to be unconstitutional will be stated. The Constitution of 1865, Art. II. sec. 14, prohibited such subscriptions "unless two-thirds of the qualified voters of the" municipality issuing the bonds "shall assent thereto." The Township Aid Act authorized the issue of bonds "if two-thirds of the qualified voters of the township voting at such election

visions and extent of the legislative enactments on the subject.<sup>1</sup> Thus where authority was given to certain counties lying north of

are in favor of the subscription." The Supreme Court held that there is a broad difference between the Constitution and the act, — the former requiring the assent of two-thirds of the qualified voters of the municipality, while the latter requires the assent of only two-thirds of the qualified voters who vote at the election. The same case, in the court below, decided on another ground, — the constitutional question being made for the first time in the Supreme Court, — is reported in 3 Dillon C. C. R. 150. *Post v. Supervisors*, 105 U. S. 667; *South Ottawa v. Perkins*, 94 U. S. 260. In these two cases an act authorizing the issue of municipal bonds which had been passed in conformity with the requirements of the Constitution of Illinois was declared void by the Supreme Court of the United States, following the uniform decisions of the State court, and the bonds issued in pursuance of it were held to be invalid even in the hands of those who took them for value, and in the belief that they had been lawfully issued.

*Effect of constitutional provision adopted in 1870 on existing powers to aid railways in Mississippi.* *Infra*, sec. 544, note; *Calhoun Co. Sup. v. Galbraith*, 99 U. S. 214; *Woodward v. Calhoun Co. Sup.* (U. S. Dist. Court for Mississippi, *Hill*, J.), 2 Cent. Law Jour. 396. In *Ohio*, *Cass v. Dillon*, 2 Ohio St. 607; *State v. Union Tp.*, 8 Ohio, 394. In *Missouri*, *State v. Sullivan Co. Court*, 51 Mo. 531; *Kansas City, St. J. & C. B. R. R. Co. v. Nodaway Co. Court Jus.*, 47 Mo. 349; *State v. Same*, 48 Mo. 339; *State v. Macon Co. Court*, 41 Mo. 453; *Smith v. Clark County*, 54 Mo. 58; *State v. Greene County*, 54 Mo. 540; *Thomas v. Scotland County*, 3 Dillon C. C. R. 7; *Nicolay v. St. Clair County*, *Ib.* 163; *Huidekoper v. Dallas County*, *Ib.* 171; *Jordan v. Cass County*, *Ib.* 185; *Foster v. Callaway County*, *Ib.* 200; *Henry County v. Nicolay*, 95 U. S. 619; *Callaway County v. Foster*, 93 U. S. 567; *Louisiana v. Taylor*, 105 U. S. 454; *Ralls County v. Douglass*, *Ib.* 728; *Scotland County v. Thomas*, 94 U. S. 682; *Macon County v. Shores*, 97 U. S. 272.

See, also, *Cass County v. Gillett*, 100 U. S. 585, affirming *Henry County v. Nicolay*, 95 U. S. 619; *Jarrott v. Moberly*, 5 Dill. 253; *Howard County v. Paddock*, 110 U. S. 884.

The provisions of the Constitution which require the assent of two-thirds of the qualified voters of a county to a subscription on its behalf for stock in a corporation, do not apply to cases where such subscription is made for stock in a railroad company pursuant to the power conferred by its charter granted prior to the adoption of that Constitution, notwithstanding the contemplated road is a branch road, the construction of which, although authorized by such charter, is undertaken as an independent enterprise under the act of March 21, 1868, entitled "An act to aid in the building of branch railroads in the State of Missouri." *Cass County v. Gillett*, 100 U. S. 585; *Scotland County v. Hill*, 132 U. S. 107 (1889); *ante*, sec. 540.

<sup>1</sup> *German Savings Bank v. Franklin County*, 128 U. S. 526, 538 (1888). "When the Savings Bank purchased the bonds, it was, notwithstanding the recitals on the face of them, chargeable with notice of the Act of April 16, 1869 [which contained provisions which invalidated the bonds, but which Act was not recited or referred to in the bonds], and of the construction which had then been given to it by the Supreme Court of Illinois prior to the issue of these bonds, in *Town of Eagle v. Kohn*, 84 Ill. 292." *Ib. per Blatchford, J.*, pp. 537, 538. *Post*, sec. 545, note. "Every person dealing with such a corporation must, at his peril, take notice of the existence and terms of the law by which it is claimed the power to issue such bonds is conferred. The power to issue such bonds is derived exclusively from the legislative authority of the State, and the laws which confer them enter into and form a part of the bonds themselves. The holder of a municipal bond is chargeable with notice of the statutory provisions under which they are issued." *Wallace, J. National Bank v. St. Joseph*, 31 Fed. Rep. 216. In this case a statutory

the Missouri River, a subscription made and bonds issued under such authority by a county *south* of the river are void in the hands of everybody.<sup>1</sup>

provision authorizing the city to call in bonds and pay the same at any time, and providing that upon tender of the principal the interest should cease, was held to be effective as against a holder for value before maturity. Citing *Ogden v. County of Davies*, 102 U. S. 634; *Anthony v. Jasper County*, 101 U. S. 693; *Northern Bank of Toledo v. Porter Tp.*, 110 U. S. 608. *Infra*, sec. 543.

<sup>1</sup> *Sherrard v. Lafayette County*, 3 Dillon C. C. R. 236 (1875). The case was briefly this: By an act of the legislature of *Missouri*, a company was incorporated with power to construct a railroad from the town of Louisiana, which is situated on the Mississippi River, *north* of the Missouri River, to a point on the Missouri River, and the county court of any county in which *any part of the route* of said road should lie was authorized to subscribe stock to the company, without a vote of the people. Afterwards the new Constitution of *Missouri* went into effect, prohibiting the General Assembly (1) from creating corporations by *special* act, except for municipal purposes; (2) from authorizing any county, &c., to become a stockholder in, or loaning its credit to, any company, association, or corporation, *unless two-thirds of the qualified voters should assent thereto*. Subsequently to this the legislature passed an act purporting to amend the charter of the said railroad company, which provided that the county court of any county in which any part of the line of said railroad might be located might subscribe to the stock of said company and issue bonds, &c. Under this act, the county court of Lafayette County, a county lying wholly *south* of the Missouri River, issued *without a vote of the people*, the bonds from which the coupons here sued on were detached, and several instalments of interest had been paid on them. *Held*, 1. That the amendatory act from which authority to issue these bonds is claimed is a *special* act, in effect creating a new corporation, and is hence inhibited by the State Constitution. 2. That it was not competent for the legis-

lature, by extending the route of the proposed road beyond the point designated in the original charter, to authorize a county *south* of the Missouri River to incur indebtedness in aid of the road, without a two-thirds vote as required by the Constitution. 3. That since there was an entire want of power to issue the bonds, they were void even in the hands of innocent purchasers. 4. That the fact that the county court had paid interest on these bonds did not estop it from afterwards setting up their invalidity. But see *Burr v. Chariton County*, 12 Fed. Rep. 848.

*Construction of special power.* The act which authorized the issuing of the bonds to pay the county subscriptions to a railway company directed that the bonds so issued should be made payable to "the president and directors of the railroad company, and their successors and assigns." The bonds issued were made payable to "the railroad company or bearer." It was held that the power granted was sufficiently pursued, and that the bonds so issued were valid. *Woodward v. Calhoun Co. Sup. (U. S. Dist. Court for Mississippi, Hill, J.)*, 2 Cent. Law Jour. 396 (1874). Special act held to control general act. *Chicago, B. & Q. R. R. Co. v. Otoe County*, 16 Wall. 667 (1872).

*Power to donate bonds in lieu of lands and right of way.* By various provisions of a city charter, the mayor and city council were authorized to make donations of land for the right of way and other privileges to a railroad company, and to expend money for the purpose of acquiring land to be given, and were authorized to borrow money to an unlimited extent, when instructed so to do by a popular vote, and further, to issue bonds to fund any indebtedness of the city, existing or to be created. Under this authority, a railroad company, by reason of complying with certain conditions, became entitled to demand from the city the right of way and depot grounds. The company agreed with the city to accept the bonds voted to procure the right of way and grounds in lieu



### § 543. Registration of Bonds ; Effect of Fraudulent Antedating.

— The history of the issue of municipal bonds in this country shows that conditions imposed by law requiring a popular vote, or conditions in the propositions submitted to the voters, intended to prevent fraud and to secure the actual building and completion of the roads, have been often evaded, and bonds issued without compliance therewith. Such bonds, when negotiated for value, the courts, as we have seen, have held to be binding. To prevent such improper or improvident issue of bonds in the future, the legislatures of some of the States have passed acts *requiring all bonds to be registered* with one of the executive departments of the State before they are issued or negotiated. Thus in 1872<sup>1</sup> the legislature of Missouri, a State in which many fraudulent bonds had been issued, passed an act which provided that “*before any bond, hereafter issued by any county, . . . shall obtain validity or be negotiated,*” it must be *first* registered by the State auditor, who shall certify thereon that all conditions precedent required by law, and by the contract under which the bonds were ordered to be issued, have been complied with. In the case of *Anthony v. Jasper County*,<sup>2</sup> it appeared that

of the right of way and grounds, and it was held that the city had the power thus to agree, and that the bonds were valid. *Converse v. Fort Scott*, 92 U. S. 503 (1875); s. c. 3 Cent. Law Jour. 449.

A proposition once voted down may be subsequently re-submitted and adopted, unless the act evinces a contrary intention. *Soc. for Sav. v. New London*, 29 Conn. 174; *Smith v. Clark County*, 54 Mo. 58; *Woodward v. Calhoun County*, 2 Cent. Law Jour. 396. In *Kentucky* it is held that municipal corporations are not restricted to one subscription. *Tyler's Ex. v. Elizabethtown & P. R. R. Co.*, 9 Bush (Ky.), 510 (1872). Second subscription held valid. *Ib.*

Issue of bonds before law authorizing it took effect. *Rochester v. Alfred Bank*, 13 Wis. 432; *Berliner v. Waterloo*, 14 Wis. 378.

<sup>1</sup> Act of March 30, 1872 (Laws of Missouri, 1872, p. 56).

<sup>2</sup> *Anthony v. Jasper County*, 4 Dillon C. C. R. 136 (1876); s. c. 3 Cent. Law Jour. 321; affirmed 101 U. S. 693. In delivering its judgment, the Circuit Court said: “If the bonds bore date after the act of March 30, 1872, and had not been registered, it is plain, we think, that they

would have no ‘*validity*,’ and hence could not support an action in the hands of any person. But they are antedated; and the question is, whether they have validity in the hands of the innocent purchaser. Upon the best consideration we have been able to give, our conclusion is that the bonds cannot be enforced. The case comes within the doctrine, which is well settled, that where a statute declares absolutely and without exception that a contract or bond or note is void, it is void into whosoever hands it may come. This statute declares that no unregistered bond shall be valid or be negotiated. Bonds must *first* be registered. Without registration they ‘*obtain no validity*.’ Such is the statute. A declaration that bonds shall have no validity is equivalent to declaring them to be void. Is the county estopped to set up this defence? We think not. The case is to be distinguished, we think, from those decided by the Supreme Court of the United States, in which it is held that the frauds of the officers cannot be visited upon the innocent bondholder, and falls within the principle of *Bayley v. Taber*, 5 Mass. 286. In that case it was held, where a statute enacted that promissory notes of a certain description, ‘made or

bonds were signed, sealed, and issued in the manner above appearing, *after* this statute went into effect, and were antedated to a date prior to the passage of that enactment. In point of fact the conditions on which the bonds had been voted had not been fully complied with; and hence they could not have been, and were not, certified by the auditor as registered bonds. The bonds found their way into the hands of an innocent holder for value, who did not know that the bonds bore a false date. The Circuit Court held that the bonds could not be enforced, and that the county was not estopped to set up the defence, — a decision which necessarily implied a distinction between such a case and those in which the Supreme Court of the United States had held that the county or municipality could not visit the frauds of their officers upon the innocent holders of the bonds. The case was taken to the Supreme Court of the United States, and the distinction taken below was adjudged to be sound.<sup>1</sup>

A municipal corporation issued bonds *valid on their face, but in*

issued' after a specified day, should be 'utterly void, and no action should be sustained thereon,' that it was competent to the makers of such notes, when sued upon notes bearing date *before* the day fixed by the statute, to prove that they were, in fact, made and issued *after* such day. The principle of that case is the same as in the case at the bar, and if that is a sound principle when applied to the individual maker of prohibited paper, it should apply with at least equal force in favor of public bodies, where one or two officers, without the consent of the others, may, as in this case, combine to evade the law, the other officers being innocent of wrongful participation. The principle involved is one of great consequence. For illustration: Loose and general powers have been heretofore given in this State to municipalities and counties to issue such bonds. This power has been taken away by the new Constitution. Can the protective provisions of that instrument be evaded and rendered useless by the mere fraudulent act of the officers of the county in antedating the bonds? If so, the power to defraud is endowed with a fearful vitality, which survives the prohibitions of the Constitution, and threatens to become immortal."

This decision was adhered to in *Hoff v.*

*Jasper County*, 110 U. S. 53, where it was also held that innocent holders for value are charged with the duty of knowing the laws concerning the registration and certification of bonds, and of inquiring whether they have been complied with. *Northern Bank v. Porter Township*, 110 U. S. 608; *Lewis v. Commissioners*, 105 U. S. 739; *Menasha v. Hazard*, 102 U. S. 81. *Construction of Kansas Bond Registration Act*. *January v. Johnson County*, 3 Dillon C. C. R. 392; *Bissell v. Spring Valley Township*, 124 U. S. 225; *Crow v. Oxford*, 119 U. S. 215; *Lewis v. Comm'rs*, 105 U. S. 739. *Nebraska Registration Act*. *Dixon County v. Field*, 111 U. S. 83. *Illinois Registration Act*. *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 540 (1888).

<sup>1</sup> *Anthony v. Jasper County*, 101 U. S. 693 (1879); *Douglass v. Lincoln County (Mo.)*, 5 Fed. Rep. 775. Where a constitution or law fails to give conclusive effect to registration or to the certificate thereof, the certificate will not conclude a municipal corporation from denying the facts certified to. *Dixon County v. Field*, 111 U. S. 83; s. c. *supra*, sec. 529 a; s. p. *German Sav. Bank v. Franklin County*, 128 U. S. 526, 540 (1888), distinguishing *Lewis v. Barbour Co. Comm'rs*, 105 U. S. 739. See also *Crow v. Oxford Tp.*, 119 U. S. 215.

*fact void, because they were antedated to evade the registration act, and were not registered; the corporation had power to borrow money, and the proceeds of the bonds passed into the city treasury and were used for lawful purposes; it was held that the corporation was liable in an action for money had and received to the purchaser of the bonds or his assignee, not for the amount of the bonds, but for the amount of money actually paid for the bonds to the corporation, with simple interest thereon.*<sup>1</sup>

§ 544. **Retrospective Statutes validating Irregular Subscriptions and Bonds.**—In the absence of special constitutional restrictions, the competency of the legislature to enact retrospective statutes, to validate an irregular or defective execution of a power by a municipal or public corporation, is undoubted.<sup>2</sup> And the power

<sup>1</sup> Wood v. Louisiana, 5 Dillon C. C. R. 122 (1878), affirmed by the Supreme Court 102 U. S. 294; Gause v. Clarksville, 1 Fed. Rep. 353; *ante*, sec. 461; compare Litchfield v. Ballou, 114 U. S. 190. See *supra*, sec. 529 *a*, and note. The general subject of *implied liability* of municipal corporations has been treated in another connection.

<sup>2</sup> Keithsburg v. Frick, 34 Ill. 405; County of Jasper v. Ballou, 103 U. S. 745; Copes v. Charleston, 10 Rich. (S. C.) Law, 491; McMillen v. Boyles, 6 Iowa, 304; *Id.* 394; Gelpcke v. Dubuque, 1 Wall. 220 (note statute there construed); People v. Mitchell, 35 N. Y. 551; Thomson v. Lee County, 3 Wall. 327; Bass v. Columbus, 30 Ga. 845 (1860); Bissell v. Jeffersonville, 24 How. 287 (1860); Campbell v. Kenosha, 5 Wall. 194; Kenosha v. Lamson, 9 Wall. 477 (1869); Steines v. Franklin County, 48 Mo. 167 (1871); Knapp v. Grant, 27 Wis. 147 (1870); Black v. Cohen, 52 Ga. 621 (1874); Duaneburgh v. Jenkins, 57 N. Y. 177 (1874), overruling s. c. 46 Barb. 294, and distinguishing People v. Batchellor, 53 N. Y. 128; Kimball v. Rosendale, 42 Wis. 407 (1877); s. c. 24 Am. Rep. 421; Ritchie v. Franklin Co., 22 Wall. 67 (1874); Bradley v. Franklin Co., 65 Mo. 638 (1877); Lewis v. Shreveport, 3 Woods C. C. 205; Cooley on Const. Lim. 371, and cases there cited; *ante*, secs. 70, 75, 79, 419; *post*, sec. 554, note; Bolles v. Town of Brimfield, 120 U. S. 759; Otoe County

v. Baldwin, 111 U. S. 1; Thompson v. Perrine, 103 U. S. 806; approved Same v. Same, 106 U. S. 589; Dows v. Town of Elmwood, 34 Fed. Rep. 114; Gardner v. Haney, 86 Ind. 17. The legislature may legalize a subscription to the stock of a railroad, made by a municipal corporation without authority, unless prohibited by the Constitution, and if the subscription would have been legal had it been done under legislative authority. Grenada County v. Brogden, 112 U. S. 261, distinguished Hays v. Holly Springs, 114 U. S. 120, referred to *infra*. See also Otoe County v. Baldwin, 111 U. S. 1; Cooley on Taxation, 223, 232.

In *Mississippi* it is held that where the State Constitution prohibits the legislature from authorizing the issue of municipal obligations in aid of corporations, or lending of credit therefor, except on condition that two-thirds of the qualified voters assent thereto at an election, the legislature cannot, by a mere retrospective act, validate municipal bonds which were issued without legislative authority before the Constitution became operative. Sykes v. Columbus, 55 Miss. 115; Grenada Co. v. Brogden, 112 U. S. 261; Hays v. Holly Springs, 114 U. S. 120, referred to in this section, *infra*. See also, Cairo, & St. L. R. R. Co. v. Sparta, 77 Ill. 505 (1875).

In St. Joseph Township v. Rogers, 16 Wall. 666, where it appeared that the election at which the subscription was

to cure defective subscriptions to the stock of railway companies and to validate bonds issued therefor has been frequently exercised

approved was held before the passage of the law authorizing the subscription, the court said: "Argument to show that defective subscriptions of the kind may, in all cases, be ratified where the legislature could have originally conferred the power is certainly unnecessary, as the question is authoritatively settled by the decisions of the Supreme Court of the State (*Illinois*), and of this court in repeated instances." And again: "Mistakes and irregularities are of frequent occurrence in municipal elections, and the State legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of legislative authority."

The Constitution of *Illinois* of 1848, Art. ix., sec. 5, declared "that the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The Supreme Court of the State (*Marshall v. Silliman*, 61 Ill. 218; *Wiley v. Silliman*, 62 Ill. 170; see *ante*, secs. 79, 419) decided that this section having been intended as a limitation upon the law-making power, the legislature could not grant the right of corporate taxation to any but the corporate authorities, nor coerce a municipal corporation to incur a debt by the issue of its bonds for corporate purposes. And the court held that an act validating an election, irregularly called and notified, to vote upon the question of township subscription, and declaring the same legal and binding, was void. In the opinion of the court, the act was an effort to confer the power of municipal taxation upon persons who were not, by themselves, the corporate authorities in the sense of the Constitution, and to compel the town to issue its bonds for railroad stock, by declaring a void proceeding to be a valid subscription. The liability of the township on

the same bonds afterwards came before the Supreme Court of the United States in *Elmwood Township v. Marcy*, 92 U. S. 289 (1875), and a majority of the court, not vindicating, nor, it would seem, approving, the decision of the Supreme Court of *Illinois*, nevertheless, as there had been in their view, no conflicting decisions of that tribunal on the point, and as it involved the construction of a "peculiar provision of the Constitution of *Illinois*," they felt bound to follow it, although it was made after the bonds in question had been issued. *Clifford, Swayne, and Strong, JJ.*, dissented, on grounds which would seem to be strongly supported by the previous decisions of the court. *Marshall Co. Sup. v. Schenck*, 5 Wall. 772; *Pine Grove Tp. v. Talcott*, 19 Wall. 666, 677; *Chicago, B. & Q. R. Co. v. Otoe County*, 16 Wall. 667; *Olcott v. Fond du Lac Co. Sup.*, *Id.* 678; *Quincy v. Cooke*, 107 U. S. 549.

In *Foote v. Johnson County*, 5 Dillon C. C. R. 281 (1878), it was ruled that the Supreme Court of the United States, having held the "township railroad aid act" of *Missouri* constitutional (*Cass County v. Johnston*, 95 U. S. 360), it was the duty of the Circuit Court to follow that judgment, notwithstanding the later decision of the Supreme Court of *Missouri* in *The State v. Brassfield*, 67 Mo. 331 (1878); and that where negotiable commercial securities are issued and negotiated before there is any decision by the courts of the State against the validity of the act authorizing their issue, the Supreme Court of the United States does not consider itself bound to follow a subsequent decision of the local courts invalidating such securities, but will decide for itself whether, under the Constitution and laws of the State, such securities are valid or void. *s. p. Douglass v. County of Pike*, 101 U. S. 677 (1879).

The rights of the innocent holders of municipal bonds issued in aid of railroads "are to be determined by the law as it was judicially construed to be when the bonds were put on the market as commercial paper." *County of Ralls v. Doug-*

and judicially sustained. Subsequent legislative sanction within constitutional limits is equivalent to original authority.<sup>1</sup> But the intention of the legislature to validate the subscription or the bonds must clearly appear from the terms of the curative act. An oblique validation, or one expressed in doubtful, covert, or obscure language, will not be sufficient, especially where the subscription was made or the bonds issued in disregard of conditions which the Constitution required the legislature of the State to impose upon the municipality before the *power* to make the subscription or to issue the bonds should arise or exist.<sup>2</sup>

lass, 105 U. S. 728; Green County v. Conness, 109 U. S. 104; Sawyer v. Concordia Parish, 12 Fed. Rep. 754; Marshal v. Elgin, 8 Fed. Rep. 783. This subject is fully and instructively discussed in the recent cases of German Sav. Bank v. Franklin County, 128 U. S. 526 (1888), and Scotland County v. Hill, 132 U. S. 107 (1889). See *ante*, sec. 542, note.

<sup>1</sup> Wilson v. Hardesty, 1 Md. Ch. 66; County of Jasper v. Ballou, 103 U. S. 745; Shaw v. Norfolk R. R. Co., 5 Gray (Mass.), 180; Satterlee v. Matthewson, 2 Pet. 380; Wilkinson v. Leland, 2 Pet. 627; Watson v. Mercer, 8 Pet. 88; Charles River Bridge v. Warren Bridge, 11 Pet. 420; Stanley v. Colt, 5 Wall. 119; Croxall v. Sherer, 5 Wall. 268; Keithsburg v. Frick, 34 Ill. 405.

<sup>2</sup> Hayes v. Holly Springs, 114 U. S. 120 (1884). In this case it appeared that the Constitution of *Mississippi* of 1869 prohibited the legislature from authorizing any municipal subscription to any corporation "unless two-thirds of the qualified voters at a special or regular election shall assent thereto." In 1871, *without any statute authorizing it*, an election was held in the City of Holly Springs, *Mississippi*, which resulted in favor of a subscription by the city of \$75,000 to a specified railroad company. In 1872, the legislature passed an act providing that "all subscriptions to the capital stock of the said railroad company made by any county, city, or town in this State not in violation of the Constitution, are hereby legalized, ratified and confirmed." After this act bonds of the city were issued, which recited that they were "issued under and in pursuance of the Constitution and laws of *Mississippi*, and authorized by a vote of the people of

the city at a special election held for the purpose." But as the provisions of the Constitution are inhibitory upon the legislature, and not enabling to the city; as under the Constitution legislative authority to enable the municipality to issue such bonds *must* provide for the assent of two-thirds of the voters at an election; as no such election had been provided for by legislative act; as the curative act of 1872 made no reference to the unauthorized election of 1871, and did not ratify and approve it; and as the language of the curative act was too vague to warrant the conclusion with certainty, that the legislature "intended to confirm and ratify the subscription in question,"—it was held to be insufficient for that purpose, and the plaintiff, although a *bona fide* holder of the bonds containing the recitals of full compliance with the Constitution and laws of the State, was defeated. The case was distinguished from the case of Grenada County v. Brogden, 112 U. S. 261, also from *Mississippi*, since in that case the legislature had in the curative act "designated and identified the voting at an election, described as resulting in an approval by the constitutional two-thirds of the qualified voters, followed by an authority to Grenada County, declared to be based upon such approval, to subscribe for the stock." *Per Blatchford, J.*, in *Hayes v. Holly Springs*, 114 U. S. at p. 126.

As to the recitals in the bonds (see *supra*), the court said, "Even a *bona fide* holder of a municipal bond must show legislative authority in the issuing body to create the bond. Recitals on the face of the bond or acts *in pais*, operating by way of estoppel, may cure irregularities in the execution of statutory power, but they

§ 545. **Want of Power always a Defence ; Question of Power is the One of Chief Interest and Importance.** — Touching the rights of the holder of authorized negotiable municipal securities, it may again be observed that such instruments are *commercial paper*, and governed by the rules of the law merchant concerning such paper, and that as respects a holder for value, before due, without notice of facts constituting a defence thereto, the only defence which is available is, that there was *no power* in the defendant corporation to issue the bonds or instruments in question. By want of *power* as here used is meant the want of any existing valid legislative act authorizing the municipality to make the bonds or instruments ; not irregularities in the exercise of the power, but want of legislative power itself. This principle is thus expressed in one of the judgments of the Supreme Court : “ Bonds payable to bearer, issued by a municipal corporation, . . . if issued in pursuance of a power conferred by the legislature, are valid commercial instruments ; but if issued by such a corporation which possessed *no power* from the legislature, they are invalid, even in the hands of innocent holders.”<sup>1</sup> *Irregularities* in the exercise of the power, as against a holder for value, without notice of such irregularities, constitute no defence.<sup>2</sup> Since, therefore, *want of power* is the *only* defence open to the corporate maker of such instruments, when they have been negotiated for value to innocent holders, the question of *power* is the one around which the principal interest centres, and to which, in its various phases, we have given our main attention.

§ 546. **Bonds void against bona fide Holders ; Recitals in Bonds cannot cure want of Power to Issue.** — Where there is an entire absence of power, as distinguished from a defective execution of the power, then the recitals of those invested with the ministerial duty of issuing the bonds will afford no protection even to *bona fide* holders for value.<sup>3</sup> If such bonds are issued without legislative

cannot create it. If, as in the present case, legislative authority is wanting, the bond has no validity.”

<sup>1</sup> Per *Clifford, J.*, in *St. Joseph Township v. Rogers*, 16 Wall. 644, 659 (1872). As nearly all the cases in the Supreme Court have turned on the question of power, it is not deemed material again to cite them in this connection, as the propositions in the text are no longer the subject of judicial controversy. *Ante*, sec. 529 *a*, as to invalidity of bonds issued in

violation of a constitutional provision. See *post*, chapter on Mandamus.

<sup>2</sup> *Jacksonville, N. & S. R. R. Co. v. Virden*, 104 Ill. 339 ; *Bank of Statesville v. Statesville*, 84 N. C. 169.

<sup>3</sup> *German Bank v. Franklin County*, 128 U. S. 526 (1888), is a strong application of the doctrine of the text, where bonds, notwithstanding certain recitals (*ante* sec. 542, note), were held void in the hands of *bona fide* holders. See, also, *Force v. Batavia*, 61 Ill. 100 ; *Williams v.*

authority they are void, and the levy of taxes and payment of interest will not render them valid.<sup>1</sup> So where *there is want of power* the mere silence of the taxpayer in permitting the issue of bonds will not create an estoppel even in favor of an innocent holder for value.<sup>2</sup> It is the duty of purchasers to examine into the *power* of the municipality to issue the bonds, and if no power exists there can be no recital which will protect even *bona fide* holders for value.<sup>3</sup>

§ 547. **Laches ; Acquiescence ; Failure to enjoin the Issue ; Payment of Interest, and retaining the Consideration, as Grounds of Estoppel.** — The cases we have heretofore considered were mainly those in which the municipality has been held estopped by the recitals in the bonds to show that conditions precedent had not been complied with. We will now advert to other grounds of estoppel, arising from the acquiescence or acts of the municipal authorities. It is undoubtedly a sound proposition that a municipal corporation, as well as a private corporation, may, in the absence of constitutional or legislative restriction, confirm acts, not *ultra vires*, which it may deem beneficial to it.

§ 548. **Same subject.** — As experience shows that the officers of public and municipal corporations do not guard the interest con-

Roberts, 88 Ill. 13 ; Lippincott v. Pana, 92 Ill. 24 ; Eddy v. People, 127 Ill. 428 (1889) ; Sykes v. Columbus, 55 Miss. 115 ; Williamson v. Keokuk, 44 Iowa, 88 (1876) ; Aspinwall v. Daviess County, 22 How. 364 ; Marsh v. Fulton Co., 10 Wall. 676 ; Citizens' Loan Assoc. v. Topeka, 20 Wall. 655 ; St. Joseph v. Rogers, 16 Wall. 644 (1872). See, also, Avery v. Springfield, 14 Blatchf. 272. See *supra*, sec. 529 *a*, and note ; Duke v. Brown, 96 N. C. 127 ; Millerstown v. Frederick, 114 Pa. St. 435 ; Ottawa v. Carey, 108 U. S. 110 ; Purdy v. Lansing, 128 U. S. 557 (1888) ; Agawam National Bank v. South Hadley, 128 Mass. 503.

<sup>1</sup> Citizens' Savings & Loan Association v. Topeka, 20 Wall. 655 ; Schuyler Co. Sup. v. Farwell, 25 Ill. 181 ; Marshall Co. Sup. v. Cook, 38 Ill. 48 ; Lippincott v. Pana, 92 Ill. 24. In Loan Association v. Topeka, the court says : " We do not attach any importance to the fact that the town authorities paid one instalment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of

these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose."

So where a county court was empowered to issue bonds to the amount of \$250,000, bonds issued in excess of that sum were declared void in the hands of a purchaser before maturity, for value and without notice of the overissue. Daviess County v. Dickinson, 117 U. S. 657. See *supra*, sec. 529 *a*.

<sup>2</sup> McPherson v. Foster, 43 Iowa, 48 (1874).

<sup>3</sup> One who purchased bonds from a railroad company, which had been issued by a town in its aid, was held, after the bonds had been declared void, *not to be subrogated* to the rights of the company, if it had any, to enforce collection of the appropriation voted by the town. Aetna Life Ins. Co. v. Middleport, 124 U. S. 534.

fided to them with the same vigilance and fidelity that characterize the officers of private corporations, the *principle of ratification by laches or delay* should be more cautiously applied to the former than to the latter. But the principle applies to both classes of corporations, as well as to natural persons. The general doctrine is undoubted,—that there is ordinarily no estoppel in respect to acts which are in violation of the Constitution or of an act of the legislature, or which are obviously and in the strict and proper sense of the term, *ultra vires*. The history of the doctrine of *ultra vires* in Great Britain and in this country makes it difficult to affirm that the rule is without exceptions; and it is the part of prudence and wisdom to keep close to the adjudications without undertaking to formulate in advance rules of universal application. Precision is absolutely essential to legal conceptions. A legal term which stands for an indefinite idea or for several different ideas will necessarily introduce confusion when used without qualification; and perhaps no term in the law has been more unfortunate in this respect than the expression *ultra vires*. We mean by it, as here used, the want of legislative power, under any circumstances or conditions, to do the particular act in question. As to *irregularities* in the exercise of an express power to issue bonds, and particularly in respect to steps connected with preliminary conditions, the failure of the municipality or of the taxpayer to enjoin the issue, followed by long acquiescence, especially when this is accompanied by affirmative acts which recognize the validity of the bonds, such as receiving and holding the stock or consideration for the bonds, or paying interest on them for a series of years, *has been held to estop the municipality from defending*, on the ground of non-compliance with conditions precedent,—especially when the bonds, as is usually the case, have been negotiated for value. But the corporation is in no case estopped from setting up a *total want of power* to issue the bonds. The leading cases in the Supreme Court relating to the subject-matter of this section are referred to in the note.<sup>1</sup> It is

<sup>1</sup> As to the effect of *failure to enjoin* the issue of the bonds and of acquiescence in the irregular exercise of the power, see *Rogers v. Burlington*, 3 Wall. 654, 667. Compare dissent on this point, *Ib.* p. 672; *Bissell v. Jeffersonville*, 24 How. 300; *Cóoley on Taxation*, 548, 549; *ante*, sec. 522, note; *Butler v. Dunham*, 27 Ill. 477; *Steines v. Franklin County*, 48 Mo. 176, 185; *State v. Van Horne*, 7 Ohio St. 331; *Barrett v. County Court*, 44 Mo. 201; *Shoemaker v. Goshen Tp. Trs.*, 14 Ohio

St. 587. No estoppel when bonds are issued in excess of a constitutional limitation on the amount which may be issued. See *supra*, sec. 529 a.

In *Supervisors v. Schenck*, 5 Wall. 781, — from *Illinois*, — which is an important case on this subject, it appeared that in *Illinois* counties were authorized, upon a popular vote, to subscribe for stock and pay therefor in bonds; an election was ordered by the *county court* in a certain county, when it should have been ordered



obvious that a *constitutional* provision requiring a public sanction to a subscription by a municipality to railroad stock prevents the subsequent acts of the municipal officers from operating as a ratification without the assent of the voters.<sup>1</sup>

(by reason of a change in the law) by the *board of supervisors*; it was duly held; the proposition was carried; the *supervisors* made the subscription, issued the bonds, received the stock, and ordered the levy of taxes, and paid the coupons for nine or ten years; and it was held by the Supreme Court of the United States, in conformity with the doctrine of the State Supreme Court, as first announced but subsequently overruled, that the acquiescence, conduct, and acts of the county authorities were a ratification of the bonds, at least when in the hands of an innocent holder, and estopped the county to make the defence that the election had been ordered by the county court instead of the board of supervisors. In view of the facts as stated, the judgment of the court would appear to be sound and open to no criticism, as the ground of the objection to the bonds was an irregular exercise of an admitted power in the county, and not a want of power. The recital in the bonds is not given, but it would appear from the opinion that the plaintiff's case also fell within the doctrine of *Knox Co. Comm'rs v. Aspinwall*.

In *Pendleton County v. Amy*, 13 Wall. 297 (1871), decided on demurrer, it did not appear that there was any estoppel by reason of recitals in the bond, or from subsequent payment of interest; but the pleadings showed that the county had received in exchange for the bonds a certificate of the stock of the railroad company, which it had held for seventeen years before the suit was brought, and still held. The county was authorized to purchase the stock, but only on condition of a popular vote. It was decided by the Supreme Court that purchasing and holding the stock under these circumstances estopped the county to assert against an innocent holder of the bonds that they were issued in disregard of the condition of a popular election, required by the act of the legislature conferring the power. Three of the judges dissented, probably on

this point; and certainly the case seems to be an extreme application of the doctrine of estoppel. The bonds (so far as appeared) were without recitals; no payment of interest had been made; a popular vote was made necessary, and the plea alleged that no such vote had ever been had, and that the question of subscription had never been submitted to or voted upon by the people; and the mere receipt and holding of the stock were held sufficient to estop the county to make the defence. We have not been able to reconcile the case, on this point, with *Marsh v. Fulton County*, referred to in a subsequent portion of this note.

The case of *Marsh v. Fulton County*, 10 Wall. 676 (1870), decides this principle, viz., that where, under the legislation of the State, the county authorities had no power to subscribe for stock and issue bonds therefor, and where (as held) they made the subscription and issued the bonds without the sanction of a popular vote, *the bonds containing no recital*, such bonds are void, and are not ratified by acts of the county authorities, such as appointing agents to participate in the corporate meetings of the railway company, by the payment of part of the bonds and the interest on the others for a series of years; and the reason given by the court was that no ratification could be made unless it was authorized by the people, the defect being one of power. *Field, J.*, observed: "They [the supervisors] could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization." Compare *Pendleton County v. Amy*, *supra*.

<sup>1</sup> *Norton v. Shelby County*, 118 U. S. 425; following *Aspinwall v. Daviess County*, 22 How. 364; *Marsh v. Fulton County*, 10 Wall. 676, 684; *Wadsworth v. Eau Claire County Sup.*, 102 U. S. 534.

§ 549. **General Summary of Doctrine of the Supreme Court as to Estoppel by Recitals.** — In passing from this portion of our subject, we may observe that if we have not mistaken *the meaning and effect of the leading judgments of the Supreme Court* which we have passed in review, they establish the following principles: The purchaser is bound to see that there exists legislative power not in conflict with the State Constitution for the issue of the bonds or commercial securities of the municipal, public, or *quasi* corporation, and is bound to notice the contents and recitals in the instruments; but if such bonds are duly executed by the proper officers, and if these officers are, by the true construction of the legislative enactment in that regard, invested with the power to decide whether conditions precedent have been performed, and the bonds contain a recital that such conditions have been complied with, or a recital which implies such compliance, whether the preliminary conditions consist of facts *in pais* or facts of record, — the issue of the bonds, under such circumstances with such a recital, is conclusive against the municipality as to the fact or facts recited or implied in the recital, and estops it, in an action by an innocent holder for value, before due, to show the contrary. This is the doctrine of the Supreme Court of the United States; and the point in which it differs from the general line of decisions in the State courts is in regard to the evidence of compliance with conditions precedent. In all the cases in the Supreme Court of the United States, that tribunal has held that the municipal or local officers were constituted the judges to decide whether antecedent or preliminary steps or conditions had been complied with, and that their decision, stated or implied in the recital, was conclusive against the corporate maker when the bonds have found their way into the hands of innocent holders. The view which holds the local officers a tribunal authorized to make so important a decision rests not alone upon an express declaration of the legislature to that effect, but may be “gathered,” by construction, from the supposed intent and purpose of the legislature. Many of the State courts, but not all of them, have taken a somewhat different view. They agree that mere *irregularities*, not relating to the essence of the power, will not affect a *bona fide* holder; but inasmuch as there exists no general power to issue such securities, and as the fact of compliance or non-compliance with conditions precedent is usually a matter of which there is a record, the purchaser of such securities is bound to ascertain whether the power to issue them existed or had arisen, especially where this depends upon matters of which a record is required to be made. The subject is full of difficulties. If the

latter view is sustained, it has the effect to impair the ready salability and market value of the securities. If the former, it has the effect of enabling the local officers in power for the time being to perpetrate, without any effectual preventive in many cases, the most outrageous frauds. On principle, it would seem that the legislative intent to invest local officers, by means of a false recital, with a power so tremendous ought not to be held to exist, unless it is declared or plainly implied, and that more caution in the purchase of these securities than is required by the doctrine of the Supreme Court would promote the interests both of the maker and the purchaser.<sup>1</sup>

§ 550 (423). **State Court Decisions relating to Municipal Bonds and the Power to issue them ; Conditions precedent.**—Some of the leading differences relating to the law of municipal railway aid bonds between the Federal and State courts have already been mentioned. Having surveyed with minuteness the course of decision in the Federal courts, a brief reference will now be made to the adjudications of State tribunals. The authority to subscribe to the stock of a railroad corporation may be *made conditional* on certain previous steps being taken, as, for example, a prior authorization of the act by a majority of the qualified voters of the municipality or district to be affected, or a recommendation in its favor and a designation of the amount by a grand jury, and the statute may be so framed as to evince the legislative intention to be that *no power* to subscribe or issue bonds shall exist unless this be done.<sup>2</sup> Thus, where the act authorizing a town to borrow money to

<sup>1</sup> This section stands as in the last edition. Nothing has been decided that clearly requires any change in it. The decisions referred to in sec. 529 *a*, *supra*, tend, perhaps it can only be said that they *tend*, to show that there are or may be certain facts of such a nature, of which a public record is required, that a purchaser may be bound to take notice of them. See *supra*, secs. 527-530.

<sup>2</sup> *Mercer County v. Pittsburgh & Erie Railroad Co.*, 27 Pa. St. 389 (1856) ; *Mercer County v. Hackett*, 1 Wall. 83 ; *Aurora v. West*, 22 Ind. 88 (1864) ; *ante*, sec. 153 *et seq.* ; *City and County of St. Louis v. Alexander*, 23 Mo. 483 (1856). In this last case the provision requiring a submission of the question to the voters "before the subscription hereby authorized shall be made," was held not

merely directory, but mandatory. Where the enabling act requires the amount to be specified, a vote not specifying definitely the amount is, as to the immediate parties, void. *State v. Saline County*, 45 Mo. 242 (1870), following *Mercer County v. Pittsburgh & Erie R. R. Co.*, 27 Pa. St. 389, and *Starin v. Genoa*, 23 N. Y. 439 (see *infra*), and distinguishing *Knox County v. Aspinwall*, 21 How. 539, and *Flagg v. Palmyra*, 33 Mo. 440. It should be remarked, however, that the case above referred to (*State v. Saline County*, 45 Mo. 242, 1870) was *mandamus* to compel the relator to deliver the bonds, and to assess taxes to pay interest on bonds which had been issued, and the writ was denied because the amount of bonds to be issued was not specified ; but subsequently, in *The State*

pay for the stock subscribed expressly provided that the officers thereof should "have no power" to do so until the written assent of two-thirds of the resident taxpayers had been obtained, this was held by the Court of Appeals of New York to be a condition precedent, without which the power did not exist.<sup>1</sup>

v. Saline County, 48 Mo. 390 (1871), it was held that such bonds, when in the hands of an innocent holder for value, could be collected. What, in the opinion of the Supreme Court of *Missouri*, such a holder must show in the way of compliance with precedent conditions, in order to recover, see the case of *Carpenter v. Inhabitants of Lathrop*, 51 Mo. 483 (1873). This case seems in spirit, if not in effect, to depart from the earlier cases in that court upon this subject. See *Railroad Co. v. Platte County*, 42 Mo. 171, where permissive words respecting an election to authorize subscriptions were held to be imperative. In *St. J. & D. C. R. R. Co. v. Buchanan Co.*, 39 Mo. 485, the words that the county court, after an affirmative vote by the people, "shall have power to subscribe," were held to leave it discretionary with the court whether to subscribe or not. In the case of *The People, ex rel. v. Tazewell County*, 22 Ill. 147, it was held, under the general law of the State, that it was discretionary whether the county should subscribe all or but a portion of the amount voted by the citizens, and that county authorities might impose any proper conditions they might choose. So where the legislature, without conditions, provides for submitting the question of subscription to the voters of a township, the electors have the power to vote to subscribe on any conditions they may see proper to annex. *People v. Dutcher*, 56 Ill. 144 (1871); see also *People v. Logan County*, 45 Ill. 162; *Veeder v. Lima*, 19 Wis. 280 (1865); *Chicago, B. & Q. R. R. Co. v. Aurora*, 99 Ill. 205; *Memphis, K. & C. Ry. Co. v. Thompson*, 24 Kan. 170. But such conditions must not violate any express provision of law or any general rule of public policy. *Coe v. Caledonia & M. Ry. Co.*, 27 Minn. 197; *Hoyt v. Braden*, 27 Minn. 490. Where the statute, as a condition precedent to the issue of bonds, required a vote of the majority of the *qualified voters*,

it was held that a vote of the electors registered and voting at a regular election under the charter was intended, and that the city authorities had no power to order a new registration. *Smith v. Wilmington*, 98 N. C. 343. *Post*, chap. xx.

<sup>1</sup> *Starin v. Genoa*, 23 N. Y. 439 (1861); *Gould v. Sterling*, *Id.* 439, 456; distinguished on this point from *Bank of Rome v. Village of Rome*, 19 N. Y. 20. Under the act it was held that the *onus* was on the plaintiff to show affirmatively the written assent of the requisite number of taxpayers; and the manner in which this must be shown is considered at length. But see *Bissell v. Jeffersonville*, 24 How. 287; *Knox County v. Aspinwall*, 21 How. 539; *Mercer County v. Hackett*, 1 Wall. 83, heretofore referred to. In *The People v. Mead*, 36 N. Y. 224 (1867), the decision in *Starin v. Genoa*, and *Gould v. Sterling*, above cited, was adhered to by the Court of Appeals, though it was admitted that a contrary ruling as to the evidence of the assent of the taxpayers had been made by the Supreme Court of the United States, in favor of similar bonds in the hands of *bona fide* holders, and the case was distinguished from *Murdock v. Aiken*, and *Ross v. Curtiss*, 31 N. Y. 606. *Starin v. Genoa*, and *Gould v. Sterling* have been expressly disapproved, as we have seen, by the Supreme Court of the United States, as respects the *bona fide* holders of bonds. *Venice v. Murdock*, 92 U. S. 494 (1875). See *supra*, sec. 526, note. Illustrating text, see *Benson v. Albany*, 24 Barb. 248.

Where the statute gives the power to issue bonds when a majority of the taxpayers whose names appear upon the last preceding tax list, or assessment roll, as owning a majority of the taxable property in the corporate limits, make application to the county judge, by petition, &c., such a petition is essential to the jurisdiction of the county judge, and the authority conferred by the act will, on *certiorari*, be

§ 551 (424). **State Court Decisions; Conditions Precedent.**— So, under an act providing "that no subscription or purchase of stock shall be made, or bonds issued, by any county or city, creating a debt for the payment of such subscription, unless a *majority of the qualified voters* of the county or city shall vote for the same," it was held that bonds issued without an election, or where the election was called by the wrong authority (as by the county court instead of the county board of supervisors), are void, *for want of power to issue them*, in whose hands soever they may be, and are not validated by the levy of taxes and the payment of interest thereon.<sup>1</sup>

required to be exercised in strict conformity with the act in its letter and spirit. The petition, it was held, must be that of the taxpayers, and it is erroneous to count as petitioners those whose names are affixed, in their absence, under previous verbal authority. In such proceedings, where there are no provisions to the contrary, competent common-law evidence of the facts to be established should be produced before the county judge, and this officer cannot act upon his personal knowledge. *The People v. Smith*, 45 N. Y. 772 (1871). *Ante*, sec. 515, note.

By its charter a city was authorized to take stock in railroads, "*provided*, that no stock shall be subscribed or taken by the common council, unless upon the petition of two-thirds of the residents of said city who are freeholders of said city." It was held, in an action by the railroad company against the city on the contract of subscription, that it was the *duty of the common council* to determine whether the requisite number of the freeholders of the city had petitioned for the subscription, no other tribunal having been provided for that purpose; and, having passed upon that question, their determination is conclusive, unless it may be set aside in some direct proceeding for that purpose. *Evansville, Ind. & C. Straight Line R. R. Company v. Evansville*, 15 Ind. 395 (1860), following and applying *Knox County v. Aspinwall*, 21 How. 539. See also *Bissell v. Jeffersonville*, 24 How. 287 (1860); *Mercer County v. Hackett*, 1 Wall. 83; compare, however, *Veeder v. Lima*, 19 Wis. 280 (1865); *Duanesburgh v. Jenkins*, 40 Barb. 574; *Society, &c., v. New London*, 29 Conn. 174; *State v. Saline County*, 45 Mo. 242

(1870). Subscriptions to turnpike roads by the county judge, under acts of the legislature, were held unauthorized and void, it being admitted that an amount of stock sufficient, with the aid of county subscriptions, to complete each mile of road, had not been taken by *private subscription*, as required by the statutes. *Clay v. Nicholas Co.*, 4 Bush (Ky.), 154. Where there is a danger of a misapplication of funds subscribed, a court of equity, and it seems a court of law, should refuse to enforce a subscription until the corporation properly secures the appropriation of the bonds, or their proceeds, in accordance with the terms of subscription. *Cumberland & O. R. R. Co. v. Washington County*, 10 Bush (Ky.), 564 (1874).

Where a municipal corporation has power to make a donation in aid of a railroad, to levy and collect taxes to pay it, or to borrow money to pay it and to issue bonds to meet the loans, the railroad company has a claim for money only, and cannot compel a municipal corporation to issue bonds for it; on the other hand, it cannot be compelled to take bonds in payment of the donation. *Chicago, D. & V. R. Co. v. St. Anne*, 101 Ill. 151. *Ante*, sec. 515, note.

<sup>1</sup> *Marshall County v. Cook*, 38 Ill. 44 (1865), commenting on and distinguishing *Mercer County v. Hackett*, 1 Wall. 83, and *Gelpcke v. Dubuque*, 2b. 175. See, also, *Shoemaker v. Goshen*, 14 Ohio St. 569; *Berliner v. Waterloo*, 14 Wis. 378; *Veeder v. Lima*, 19 Wis. 280 (1865); *Dunnovan v. Green*, 57 Ill. 63; *St. Joseph Township v. Rogers*, 16 Wall. 644 (1872); s. p. as to ratification, *Marsh v. Fulton County*, 10 Wall. 676 (1870); *Hancock v. Chicot Co.*, 32 Ark. 575 (1877). The corporation is

But *this view was denied to be sound by the Supreme Court of the United States*, which decided that an innocent holder for value of such bonds was entitled to recover upon them. The only defect in the execution of the power was that the election was ordered by the wrong authority; and the Supreme Court held that the conduct of the county in retaining the stock, and in levying taxes and paying interest for a series of years, estopped it to set up as a defence that the bonds were invalid, and it refused to follow the judgment of the Supreme Court of the State, which had held the same issue of bonds to be void.<sup>1</sup>

§ 552 (425). **Same subject.** — In a case in Ohio, where the legislature authorized "the county commissioners of *any county through or in which* a railroad might be located, to subscribe to the capital stock of the said company," and, for the purpose of paying therefor,

estopped — where the power to issue existed — from setting up *irregularities* in the issue of the bonds, after repeated payments of interest thereon. *Keithsburg v. Frick*, 34 Ill. 405; *Jasper County v. Bal-lou*, 103 U. S. 745; *Schaeffer v. Bonham*, 95 Ill. 368; *Han. & St. J. R. Co. v. Marion County*, 36 Mo. 294; *Mercer County v. Hubbard*, 45 Ill. 139; *Beloit v. Morgan*, 7 Wall. 619 (1868); *Schenck v. Marshall Co. Sup.*, 5 Wall. 772; compare *Marsh v. Fulton County*, 10 Wall. 676. The municipal authorities, on *mandamus* or other proceedings to compel them to make subscription to the railroad company, may show that the election was influenced by it and its employees, by bribery and corruption. *People v. San Fr. Sup.*, 27 Cal. 655 (1865); *Butler v. Dunham*, 27 Ill. 474; *post*, chap. xx. *What is a majority of votes.* *People v. Chapman*, 66 Ill. 137 (1873); *Decker v. Hughes*, 68 Ill. 33 (1873). Subscription cannot be made without an affirmative vote. *People v. Cass Co.*, 77 Ill. 438 (1875). The presumption is that the vote cast at an election held according to law, is the vote of the whole number of legal voters, and this presumption cannot be rebutted by proof of the number of votes cast at an election held in the preceding year. *St. Joseph v. Rogers*, 16 Wall. 664; *Melvin v. Lisenby*, 72 Ill. 63 (1874).

<sup>1</sup> *Marshall County Sup. v. Schenck*, 5 Wall. 772 (1866); *Redd v. Henry Co.*

*Sup.*, 31 Gratt. (Va.) 685, approving text. The Supreme Court of Illinois holds that since the Constitution of 1870 the *onus* is on the holder of the bonds to show that they were lawfully issued; and that they are void if the conditions on which the issue was authorized are not complied with. *Town of Prairie v. Lloyd*, 97 Ill. 179; *Town of Eagle v. Kohn*, 84 Ill. 292; *Richeson v. People*, 115 Ill. 450; *Eddy v. People*, 127 Ill. 428 (1889). *Ante*, secs. 530, and note, 539, 540. Where the legal voters of a city voted in favor of a railway subscription, to be paid in city bonds, upon the condition, among others, that the railroad should be *completed within the county on or before a certain date*, and before the expiration of that time, but after the *Illinois* Constitution of 1870 went into effect, the city council, by an order, and without further action by the voters, *extended the time for the completion of the road* within the county, the Supreme Court of the State was of the opinion that bonds issued in payment of the subscription were in violation of the condition, and were void, for the reason that the extension was not authorized by the legal voters, and the city, under the new Constitution, had no power to make a new contract in regard to such subscription. It was accordingly held that a tax levied to provide money to pay interest on the bonds could not be collected. *Eddy v. People*, 127 Ill. 428 (1889).

"to borrow the necessary amount of money, for which they shall issue their negotiable bonds," &c., it was decided to be a defence to an action on the bonds (though by a *bona fide* holder) that the railroad was "never made or located through or in the county;" that it was "located and completed so as not to touch the county." The defence was held good, upon the ground that the authority to issue the bonds never existed.<sup>1</sup> Other cases have been decided upon similar grounds.<sup>2</sup> It is the general doctrine of the State courts that not only is express authority requisite, but that the *substantial requirements of the law must be observed*; <sup>3</sup> while in the Federal courts the failure to comply with the requirements, or rather the decision of the local officers, especially when embodied in the recitals of the bond that such requirements have been complied with, is, as we have seen, no defence against the *bona fide* holders of such bonds.

§ 553 (426). **General Result stated.**—It may be remarked, in conclusion, that *this general survey of the adjudications* shows some

<sup>1</sup> Treadwell v. Hancock Co. Comm'rs, 11 Ohio St. 183 (1860), reviewing and criticising *Aspinwall v. Knox County Comm'rs*, 21 How. (U. S.) 539, approved in *Bissell v. Jeffersonville*, 24 How. (U. S.) 287 (1860). Compare *Purdy v. Lansing*, 128 U. S. 557 (1888), cited *infra*. In *Veeder v. Lima*, 19 Wis. 280 (1865), *Treadwell v. Commissioners and Gould v. Sterling*, before cited, are approved, and *Aspinwall v. Commissioners and Moran v. Miami County* are criticised. Compare *State v. Van Horne*, 7 Ohio St. 327; re-affirmed, *State v. Union Township Trustees*, 8 Ohio St. 394, 401. The two cases last cited (7 Ohio St. 327, 8 Ohio St. 394) do not intend, probably, to assert the principle that the non-action of the taxpayers or inhabitants will supply a *want of power*, in the just sense of that expression, in the trustees to subscribe for the stock, or estop the *quasi* corporation from making the defence of *ultra vires*, if it existed.

Under a charter authorizing counties "through which" a given railroad "may pass" to subscribe to its stock, it was held that a county between the termini of the road might subscribe without waiting until the route was located, or built within the county. *Woods v. Lawrence County*, 1 Black (U. S.), 386 (1861). In *Minnesota* the agreement to issue the bonds

must be perfected before the construction of the road intended to be aided. *State v. Highland*, 25 Minn. 355.

<sup>2</sup> Under the New York Act of 1871, chap. 298, which requires all the counties through which the road would pass to be designated and the road located, before the bond of any town can be issued in aid thereof, this requirement is held to go to the *question of power*, and bonds issued without previous action of the board of directors of the company, adopting the entire route, and designating all the counties through which the road would pass, are void. *Purdy v. Lansing*, 128 U. S. 557 (1888); approving *People v. Morgan*, 55 N. Y. 587; *Mellen v. Lansing*, 20 Blatchf. 278.

Bonds issued where a valid condition precedent imposed under legislative authority was disregarded, and there was no specific recital covering the point, held to be void for want of power. *German Bank v. Franklin Co.*, 128 U. S. 526 (1888). See nice distinctions there drawn in the cases on this subject.

<sup>3</sup> *Lamoille, &c. Co. v. Fairfield*, 51 Vt. 257; *People v. Waynesville*, 88 Ill. 469; *Sykes v. Columbus*, 55 Miss. 115; *Delaware Co. v. McClintock*, 51 Ind. 325 (1875); *Harding v. Rockford*, R. I. & St. L. R. R. Co., 65 Ill. 90 (1872).

difference of judicial opinion (chiefly in cases involving the rights of innocent holders of negotiable municipal securities) respecting the evidence of compliance with conditions precedent, and as to what will estop the municipality from showing non-compliance in fact with such conditions. Yet, aside from these differences, the courts all agree that such a corporation may successfully defend against the bonds in whosoever hands they may be, if its officers or agents, who assume to issue them, had, in the sense already explained, no legislative power to do so.<sup>1</sup> The officers of such corporations possess no general power to bind them, and have no authority except such as the legislature confers. If the statute authorizes such a corporation to issue its bonds *only* when the measure is sanctioned by a majority of the voters, bonds issued without such a sanction (either in fact, or according to the decision of authorized officers, or some authorized body or tribunal), or when voted to one corporation and without authority of law issued to another, are void, into whosoever hands they may come.<sup>2</sup> This is the sound and true rule of law on this subject, and the one which has had the uniform approval of the State courts in this country, and it has also received the high sanction of the Supreme Court of the United States.<sup>3</sup> The distinc-

<sup>1</sup> *Ante*, chap. vi. sec. 163. The provisions of a railroad charter made it lawful for certain counties to subscribe stock on a majority vote, and, on such vote being had, made it the *duty* of the county commissioners to subscribe for stock and issue bonds therefor. Accordingly a vote was had, resulting in favor of a subscription; *after* the vote, but *before* the subscription was actually made and the bonds issued, counties were prohibited by law from subscribing for stock, unless paid for in cash. It was held that the power to subscribe and the vote did not constitute a contract within the meaning of the clause of the Constitution making contracts inviolable; that until the subscription was actually made the contract was unexecuted; and that bonds thus issued were void, even in the hands of innocent holders for value. *Aspinwall v. Daviess Co. Comm'rs*, 22 How. (U. S.) 364 (1859); *Eddy v. People*, 127 Ill. 428 (1889); *ante*, sec. 70; *Marsh v. Fulton County*, 10 Wall. 676; *Hayes v. Holly Springs*, 114 U. S. 120; *Merchants' Bank v. Bergen County*, 115 U. S. 384, when a *bona fide* holder, for value, of bonds, containing no recitals, issued in excess of the number authorized

by law and as security for a personal debt of an officer, was held to have no claim upon the county whose bonds they purported to be.

<sup>2</sup> *Ante*, chap. vi. sec. 163; *supra*, secs. 529 *a*, 542.

<sup>3</sup> *Marsh v. Fulton County*, 10 Wall. 676 (1870). Speaking of this subject, Mr. Justice *Field*, in the case just cited, delivering the opinion of the court, says: "But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds, without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might, for such reason, be taken without special inquiry into their validity. It is a case where the power to contract never existed; where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to



tion, however, must be remembered, between 'want of power to issue the bonds and irregularities in the exercise of the power, which latter are unavailing against the *bona fide* holder without notice of the irregularity.

§ 554. **Defences; Waiver of Irregularities in Issue of Bonds, &c.**—Defences grounded on corporate neglect, or technical in their nature, are not favored when the bonds are in innocent hands.<sup>1</sup> The issue of the bonds raises a presumption that conditions precedent, imposed by *ordinance*, have been complied with or waived.<sup>2</sup> This is

justify the issue of the bonds. The authority to contract must exist before any protection as innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd Acceptances*, 7 Wall. 666. In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued.'" And in this case the bonds of the county of Fulton, though negotiable in form, and not disclosing or reciting their purpose or origin, were held void, in the hands of *bona fide* holders, for want of authority in the county to issue them, having been voted to one corporation and delivered (according to the view of the court) to another and distinct corporation. See also, *Lewis v. Barbour Co. Comm'rs*, 3 Fed. Rep. 191; noted *supra*, secs. 529 *a*, 531, note; *supra*, sec. 524. See *Society, &c. v. New London*, 29 Conn. 174; compare *People v. Mead*, 36 N. Y. 224; *Adams v. Memphis & L. R. R. Co.*, 2 Coldw. (Tenn.) 645; *Lynde v. Winnebago County*, 16 Wall. 6 (1872); *Steines v. Franklin County*, 48 Mo. 167 (1871); *Livingston County v. Weider*, 64 Ill. 427;

s. c. 5 *Chicago Legal News*, 265; *Burr v. Carbondale*, 76 Ill. 455 (1875).

<sup>1</sup> *Maddox v. Graham*, 2 Met. (Ky.) 56; *Commonwealth v. Pittsburgh*, 43 Pa. St. 391; *San Antonio v. Lane*, 32 Tex. 405.

<sup>2</sup> *Commonwealth v. Pittsburgh*, *supra*; *Gilchrist v. Little Rock*, 1 Dillon C. C. 261; *Danielly v. Cabaniss*, 52 Ga. 211 (1874); *Black v. Cohen*, *Id.* 621.

The Supreme Court of the United States has held, in an action on negotiable bonds issued by a public corporation, that where the defendant has shown *fraud in the origin or inception* of the instruments, this will throw upon the holder the burden of showing that he gave value for them before maturity. *Smith v. Sac County*, 11 Wall. 139 (1870), *Clifford, J.*, dissenting; *Montclair v. Ramsdell*, 107 U. S. 147; *Pana v. Bowler*, 107 U. S. 529, 542.

When *special authority to borrow money* or to subscribe to the stock of a railroad company will *impliedly repeal existing charter limitations* upon the amount of indebtedness that may be contracted by a municipality, or upon the rate of taxation. See *Amey v. Allegheny City*, 24 How. 364 (1860); *Butz v. Muscatine*, 8 Wall. 575 (1869); *ante*, sec. 162, and cases there cited.

Mode of *enforcing payment of municipal bonds*. See chapter on *Mandamus, post*. The authority to levy and collect special taxes to pay bonds authorized to be issued cannot be withdrawn or repealed by the legislature to the prejudice of the holder of such bonds. *Von Hoffman v. Quincy*, 4 Wall. 535 (1866); *ante*, chap. iv.; *post*, chap. xx. Where bonds of a county are

certainly so where the bonds recite in substance that they are issued under and pursuant to the enabling act.

§ 555. **Where Lost or Stolen.** — Having stated the law of municipal bonds, it may be useful to give a synopsis of the principles applicable to negotiable securities, including such bonds, when lost or stolen.

A negotiable bond stolen and its number altered by the thief has been held to be good in the hands of a *bona fide* holder, who purchased it for value.<sup>1</sup> Negotiable bonds or coupons, although stolen, are collectible by a *bona fide* holder who took them for value in the usual course of business, before maturity and without notice.<sup>2</sup> If, however, the instrument is incomplete, as if any essential part is left in blank, and is afterwards filled up by the thief, or holder under the thief, no recovery can be had; as, where in an incomplete instrument the place of payment was left in blank, and, before it was filled up by the authorized officer, the bonds were stolen.<sup>3</sup> A

legally authorized to be issued by a vote of the people, and, by the law authorizing the vote, it is provided that the bonds shall be executed by certain officers, and countersigned by the treasurer of the county, it was held, that the omission of the treasurer to countersign the bonds is a mere defect in the execution of them, which a court of equity would, in the absence of a remedy at law, ordinarily supply, and that an injunction restraining the collection of taxes for the payment of such bonds should not be allowed. *Breese, C. J.*, and *McAllister, J.*, dissenting. *Melvin v. Lisenby*, 72 Ill. 63.

*Township Railroad Aid Act of Missouri held unconstitutional.* *Webb v. Lafayette Co.*, 67 Mo. 353; *Ranney v. Bader*, 67 Mo. 476; *State v. Brassfield*, 67 Mo. 331. But the Federal courts, as to bonds previously issued, refused to follow the State court decisions. *Foote v. Johnson County*, 5 Dillon C. C. R. 281 (1878); *Douglass v. Pike County*, 101 U. S. 677 (1879). The law of New York intended to legalize the acts of commissioners to aid railways was declared unconstitutional. *Horton v. Thompson*, 71 N. Y. 513. The Supreme Court of the United States declined to follow the ruling in *Horton v. Thompson*, *supra*, and it held the same act to be constitutional and the bonds in question to be validated by it. *Thompson v.*

*Perrine*, 103 U. S. 806. See *supra*, sec. 544.

<sup>1</sup> *Elizabeth v. Force*, 29 N. J. Eq. 537; *Birdsall v. Russell*, 29 N. Y. 220; *Commonwealth v. Savings Bank*, 98 Mass. 12; *Diamond v. Lawrence Co.*, 37 Pa. St. 353; *Crosby v. New London, W. & P. R. R. Co.*, 26 Conn. 121; *Myers v. York & C. R. R. Co.*, 43 Me. 362; *Clarke v. Janesville*, 1 Biss. 98; *Morgan v. United States*, 113 U. S. 476 (reversing s. c. 18 Court of Claims Rep. 386), where alteration of numbers of stolen bonds is one of the facts stated, and where the court, while not directly passing upon the legal effect of such alteration, sustained the title of *bona fide* purchasers for value and without notice of the alteration; *Brown, Riley & Co. v. United States*, 20 Court of Claims Rep. 416, construing opinion of Supreme Court on this point in case of *Morgan v. United States*, *supra*; *Jones on Railroad Securities*, sec. 216; *Wylie v. Mo. Pac. Ry. Co.*, U. S. Circuit Court, S. D. N. Y. MSS. Compare *Suffell v. Bank of England*, 9 Q. B. D. 555.

<sup>2</sup> *Evertson v. Nat. Bank of Newport*, 66 N. Y. 14; *State v. Wells*, 15 Cal. 336; *Spooner v. Holmes*, 102 Mass. 503.

<sup>3</sup> *Ledwich v. McKim*, 53 N. Y. 307; *Jackson v. Vicksburg, S. & T. R. R. Co.*, 2 Woods, 141.

*bona fide* holder of such an instrument cannot, by inserting the name of a place in the blank, recover its value.<sup>1</sup> Where the corporate seal of the obligor and the indorsement of the trustees were both wanting when the bonds were stolen, and these were subsequently forged, and in that condition came into the plaintiff's hands, the company was not liable.<sup>2</sup> As a bond takes effect from its delivery, it is presumed that a blank as to the date in an instrument otherwise complete and duly delivered would not affect a recovery.<sup>3</sup> The insertion by the thief of the name of the payee in the blank left for that purpose when the bond was issued and delivered, is not such an alteration as will avoid the bond.<sup>4</sup> The fact of the bond, otherwise negotiable, not being payable to a particular person, does not render it non-negotiable.<sup>5</sup> If *overdue* bonds or coupons are stolen and then come into a *bona fide* holder's hands, he cannot collect their amount.<sup>6</sup> Coupons have been held to be entitled to three days' grace, so that a purchaser, after the time specified for payment, but before the expiration of the days of grace, is deemed a purchaser before maturity.<sup>7</sup> Giving immediate notice of the theft by publication will not of itself deprive the *bona fide* holder of his right to recover.<sup>8</sup> After actual service of such notice, bankers and brokers should retain a memorandum in order to identify stolen bonds if presented.<sup>9</sup>

<sup>1</sup> *Id.*

<sup>2</sup> *Maas v. Missouri, K. & T. Ry. Co.*, 11 Hun (N. Y.), 8.

<sup>3</sup> *Pierce v. Richardson*, 37 N. H. 306 ; *Bills v. Stanton*, 69 Ill. 51.

<sup>4</sup> *Boyd v. Kennedy*, 9 Vroom (38 N. J. L.), 146 ; *Dutchess Co. Ins. Co. v. Hachfield*, 1 Hun (N. Y.), 675.

<sup>5</sup> *Smith v. Clark County*, 54 Mo. 58.

<sup>6</sup> *Arents v. Commonwealth*, 18 Gratt. (Va.) 750 ; *Vermilye v. Adams Exp. Co.*, 21 Wall. 138.

<sup>7</sup> *Evertson v. National Bank of Newport*, 66 N. Y. 14 ; *Arents v. Common-*

*wealth*, 18 Gratt. (Va.) 750 (*holds that there is no grace*).

<sup>8</sup> *Seybel v. Nat. Cur. Bank*, 54 N. Y. 288 ; *Murray v. Lardner*, 2 Wall. 110.

<sup>9</sup> *Vermilye v. Adams Exp. Co.*, 21 Wall. 138. Mere omission to look for such notice several months after publication is no proof of *mala fides*. *Raphael v. Bank of England*, 17 C. B. 161. See *Preston v. Hull*, 23 Gratt. (Va.) 600 ; s. c. 21 Am. Rep. 699 ; also see elaborate note by Mr. Stewart to *Elizabeth v. Force*, in 29 N. J. Eq. 587, reversing s. c. 23 N. J. Law, 463.

























KF 5305 D57 1890

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